

"NULLITY OF MARRIAGE IN MODERN HINDU LAW"

by

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A thesis submitted for the Degree of Doctor of Philosophy
in the University of London, Faculty of Law,
October, 1965.

School of Oriental &
African Studies.

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ABSTRACT

The first Chapter investigates the question: whether nullity existed in the dharmaśāstra.

Chapter Two is concerned with bigamy as ground for nullity. The essential requirements to obtain relief where either party has a spouse living at the time of the marriage have been discussed.

In Chapter Three degrees of prohibited relationship, degrees of Sapinda relationship, and essential requirements of a custom permitting such a marriage have been dealt with.

Chapter Four defines impotence, considers instances amounting and not amounting to impotence. The media and standard of proof of impotence; factors limiting the Court's jurisdiction has also been considered.

Chapter Five considers mental incapacity sufficient to annul a marriage and the test to be applied in such a case.

Chapter Six defines force, that will suffice to entitle the petitioner to petition for a decree of nullity. Similarly, it defines the fraud and investigates the sort of concealment or misrepresentation that will suffice to entitle deceived party to petition for a decree of nullity.

Chapter Seven deals with concealed pregnancy as a ground for nullity. An attempt has been made to define such terms as "ignorant", "discovered" and "intercourse with the consent of the petitioner". Similarly the nature and standard of proof has also been considered.

Chapter Eight deals with venereal disease as a ground for nullity under the Kenya Ordinance and considers to what extent this ground may be adopted under the HMA or Uganda Ordinance.

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ABBREVIATIONS

- A.Atlantic Reporter.
- A.2d.Atlantic Reporter 2nd Series.
- A.C.Appeal Cases.
- Add. Addams' Ecclesiastical Reports.
- A.I.R..... All India Reporter.
- All.Allahabad.
- An.P.....Andhra Pradesh.
- Bom.Bombay.
- Cal.Calcutta.
- F.C.Federal Court.
- Ker.Kerala.
- Lah.Lahore.
- Mad.Madras.
- M.P.Madhya Pradesh.
- Nag.Nagpur.
- N.U.C. ...Notes of Unreported Cases.
- Or.Orissa.
- Pat.Patna.
- P.C.Privy Council.
- Pu.Punjab.
- Sau.Saurashtra.
- S.C.Supreme Court.
- Tra.C. ...Travancore-Cochin.

A.L.R.	American Law Reports.
A.L.R.2d.	American Law Reports 2nd Series.
All.E.R.	All England Reports.
Apas.	Āpastamba - dharmasūtra.
Asv.gr.	Āśvalāyana-gr̥hya-sūtra.
A.V.	Atharva-Veda.
Baud.	Baudhāyana-dharma-sūtra.
Bhar.	Bhārucin.
B.H.C.R.	Bombay High Court Reports.
Bom. L.R.	Bombay Law Reporter.
C.A.	Court of Appeal.
Can. B.R.	Canadian Bar Review.
C.L.R.	Commonwealth Law Reports. (Aus.)
Co.Rep.	Coke's Reports.
Cro.Car.	Croke's Reports.
Curt.	Curteis' Ecclesiastical Reports.
D.L.R.	Dominion Law Reports. (Canada).
Dow.	Dow's Reports, House of Lords.
E.R.	English Reports.
Gau.	Dharmasūtra of Gautama.
Gobhila gr.	Gobhila-gr̥hya-sūtra.
Hagg. Con.	Harrard's Consistorial Reports.
Hagg. ECC.	Haggard's Ecclesiastical Reports.
Hir. Gr.	Hiranyakeśi-gr̥hya-sūtra.
H.L.	House of Lords.
H.L.C.	House of Lords Cases.

I.A.	Indian Appeals.
I.C.L.Q.	International and Comparative Law Quarterly.
I.L.R.	Indian Law Reports.
	-All.	Allahabad.
	-Cal.	Calcutta.
	-Mad.	Madras.
I.R.	Irish Reports.
Kat.	Katyanana.
Kaut.	Kauṭilya Arthaśāstra.
Kay and J.	Kay and Johnsons Chancery Reports.
Ker. L.T.	Kerala Law Times.
K.K.T.	Kṛtyakalpataru of Bhaṭṭa Lakṣmīdhara.
Lee.	Sir G. Lee's Ecclesiastical Judgements.
L.Q.R.	Law Quarterly Review.
L.R.	Law Reports.
L.T.	Law Times Reports.
Manava.gr.	Mānava-grhya-sūtra.
M.H.C.R.	Madras High Court Reports.
M.L.J.	Madras Law Journal.
Medh.	Medhatithi.
Mitak.	The Commentary Mitākṣara on Yājñavalkya Smṛiti by Vijnāneśvara.
Mod.L.R.	Modern Law Review.
NE.	North Eastern Reporter.
NE 2d.	North Eastern Reporter 2nd Series.

NYS.	New York Supplement.
NYS.2d.	New York Supplement 2nd Series.
NW.	North Western Reporter.
NW 2d.	North Western Reporter 2nd Series.
P.	Pacific Reporter.
P.2d.	Pacific Reporter 2nd Series.
P.	} Probate and Divorce Division.
P.D.	
P. and D.	
Phillim.ECC.	J. Phillimore's Ecclesiastical Reports.
Rob. ECC.	Robertson's Ecclesiastical Reports.
S.B.E.	Sacred Books of the East.
S.C.R.	Supreme Court Reports.
Sm.C.	Smritichandrika.
S.P.ECC. and Ad.	Ecclesiastical and Admiralty Reports by Thomas Spinks.
St.Tr.	State Trials.
SW.	South West Reporter.
SW 2d.	South West Reporter 2nd Series.
SW and Tr.	Swabey and Triastram's Reports.
T.L.R.(N.S.).	Times Law Reports New Series.
Vasis.	Vasistha-dharmasutra.
W.L.R.	Weekly Law Reports.
W.N.	Weekly Notes.
Yajn.	Yājñavalkyaśmṛiti.
Z.V.R.	Zeitschrift für vergleichende Rechtswissenschaft.

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PREFACE

There appears to be no work devoted to a comprehensive study of the "nullity of marriage in modern Hindu Law". The purpose of the present work is modest: primarily, it is confined to an examination of the grounds recognised by the modern Hindu law for declaration of nullity.

A good piece of legislation should be unambiguous, certain and precise. The provisions of the Hindu Marriage Act, 1955, (hereinafter cited as HMA) and the parallel provisions of the Kenya and Uganda law in general and relating to "nullity" in particular seem far too often to be deficient in one or more of these elements. The main grounds of "nullity" are the creation of statute; however, such important terms as "impotence", "idiot", "lunatic", "force", "fraud", "ignorant" and "discovered" are not defined.

Nullity is not a term of art. It is predicated as an ostensibly legal marital relationship, which may be utterly void or merely voidable, is stripped of its colour of legality, and the relationship destroyed ab initio, for some reason existing at the time of the marriage although the marriage may terminate as of the date of the decree.¹

1. Corpus juris secundum. Vol.27A, p.16.

The view has been taken that "the 'category' of 'voidable' marriages as well as the retroactivity of the decree of nullity have obviously been borrowed from the English law, and, if they are to be retained in the Indian law, justification, therefore, must be founded in the potential harm to society if the marriage were merely dissolved instead of annulled."¹ Similarly, it has been argued that, "the greatest care should, therefore, be taken in importing the law of nullity in Indian statutes."² Thus two questions arose: what is the need of "nullity"? and what is the role of foreign precedents in the new institution?

(1) Need of "nullity":

The importance of nullity lies in the fact that,³

- (a) it enables to terminate a marriage where no grounds for divorce are available;
- (b) a marriage can be brought speedily to an end;
- (c) the wife's alimony is likely to commence at a low rate, and must cease altogether on her remarriage.

1. S.S. Nigan, "A Plea for a uniform Law of Divorce"; Paper Read in Hindu Law Seminar, University of Rajasthan (1964) p.23.
 2. *ibid.*
 3. J.D.M. Derrett "Aspects of Matrimonial Causes in Modern Hindu Law" [1964] *Revue du sud-est asiatique*, pp.215,235.

(2) Role of foreign precedents in the new institution:

The question is: is it necessary for the Courts to follow, in nullity proceedings, the principles and rules on which English and foreign courts act and give relief?

The law of "nullity of marriage in modern Hindu law" is in process of development, and because of infinite variety of circumstances, principles are difficult to state. What then is a judge to do? The judge, in arriving at his decision, has to be guided by some principles. In deciding whether to follow foreign precedents, in order to formulate right principles, we may take help from Gajendragadkar, J's (as he then was) observations in Attiabari Tea Co. V. State of Assam,¹ "... when we are dealing with the problems of construing a constitutional provision which is not too clear or lucid you feel inclined to inquire how other judicial minds have responded to the challenge presented by similar provisions in other sister constitutions." In accordance with this dictum it is suggested that foreign precedents may be followed in nullity proceedings, under the HMA, or Kenya Ordinance, or Uganda Ordinance, in the light of social conditions prevailing in Hindu families.

1. A.I.R. 1961 S.C. 231 at 257.

Foreign precedents constitute tentative principles which may have to be modified in the light of further information.

An attempt has been made to set out the principles relating to "nullity of marriage in modern Hindu law" as lucidly as possible, to point out contradictions where they occur, to harmonise conflicting decisions where this can be done. Accordingly, the author has set out what he understands to be the law.

I am grateful to my supervisor, Professor J.D.M. Derrett, for his help and patience during the preparation of this thesis.

The Law as stated in this thesis corresponds to that reported up to 1 July 1965.

CHAPTER I
CONCEPT OF NULLITY

(A) "NULLITY" AND ALLIED RELIEFS ACCORDING TO THE DHARMAŚĀSTRA

Section I Introduction:

Saṃskāra generally means a purificatory act or rite which being effected imparts fitness for a certain purpose.¹ The Vivāha-saṃskāra is a composite rite, comprising several subordinate elements which have to be done in a certain order, which brings about the status of wifehood in a woman.² It is more of a psychic than a merely physical bond, but it can nonetheless be annulled on the discovery of lack of one or more of the essential qualifications for marriage.

It is almost impossible to define marriage in legal terms but the shastric definition of marriage would seem to have been as follows: a union between a man and a woman which arises at the time when the ceremony of marriage has been completed, the bridegroom having the qualification for accepting a girl in marriage and the bride the qualifications

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1. Śābra on Jaimini VI, 135; Kumārilabhaṭṭa, Tantravārtika p.1115 on J III, 8,9, quoted in P.V. Kane. Hist. of Dh.S. vol.II(i) pp.190-191. As to Saṃskāras generally see R.B. Pande: History of Hindu Saṃskāras. See also: Encyclopaedia of Religion: Sacraments, Ed. G. James Hastings, vol.10, p.897; K.V. Rangaswami Aiyangar: Some Aspects of the Hindu View of Life according to Dharmaśāstras, pp.129-136.
 2. Medhatithi on Manu III, 20.

for being given in marriage, and the couple having formally or nominally accepted each other in front of the marriage fire, in which these oblations as a married pair will thenceforth be given.¹

The exact significance of samskāras was left rather vague in our authorities and their treatment of the purpose of samskāras is not exhaustive. If we look at the list of samskāras we shall find that their purposes were many. They served, on the one hand, spiritual (sic) and cultural purposes and were more or less of a popular nature having a mystical or symbolic element. On the other they also have psychological values impressing on the mind of the person that he has assumed a new role.² Thus the Vivaha consists essentially in an acceptance, which produced the mental impression that this girl is the man's wife, and wifeness arises from her having undergone the samskāra, which samskāra itself could not occur but for the marriage.³

Section II. "Nullity" and Vedic Aryans

The earlier Vedic texts (which may be said to cover the period down to the end of B.C.500) present with practical

1. J.D.M. Derrett: Hindu Law Past and Present, p.86.

2. P.V. Kane: Hist. of DS vol.II(1) pp.192-193.

3. J.D.M. Derrett: The Discussion of Marriage by Gadadhara, p.180.

uniformity the condition of marriage among Hindus. It is uncertain how far the modern rule of "nullity" was in vogue in the Vedic period. We find passages to the effect that these can be no repudiation of the sacred bond of marriage.¹ However, we do find a hymn in the Rigveda where the marriage of a brother and sister is expressly treated as improper.²

III. "Nullity" in Sutra literature:

The age of sūtras is uncertain. For our purposes it is safe to assume that they were compiled between B.C.500 and the beginning of the Christian era.³

Sutra literature does not specifically mention "nullity" but both a betrothal and marriage could nonetheless be "repudiated" under circumstances which we shall examine. We find that a betrothal could be repudiated if a blemish is discovered either in the suitor or the girl.⁴ We also find that if a suitor abandons a faultless girl after betrothal the punishment of a thief is ordained for him.⁵ Similarly if the father of the girl repudiates his daughter's betrothal and the suitor is faultless, the punishment is the same.⁶

1. R.V. X, 82,2.

A.V. XIV, 1,18,49.

2. R.V. X, 10.

3. P.V. Kane: Hist. of D.S. vol.I, p.8.

4. Vishnu V, 160,161,162.

5. Vishnu V, 162.

6. Vishnu V, 160-161.

The law provides information on what could be considered a blemish and not all these rules are relevant to our problem. But certain qualifications for marriage are insisted upon.

A man is not allowed to marry a girl who either belongs to the same Gotra¹ (i.e. a relative bearing the same family name, laukika gotra) or has the same pravara² (one descended from the same Rishi, Vaidika Gotra) and who is related to him within the prohibited degrees of relationship, i.e., sapindaship.³

What would happen if these restrictions are violated? Is the state of wifeness itself produced? What would be the girl's position? The answer appears to be that the marriage performed between two sapindas is no marriage and if a man marries a Sagotra and/or Sapravara girl he, (a) should renounce her, (b) must support her treating her like his mother and (c) must perform a penance;⁴ i.e., it is not the case that the girl is free to marry another.

However, a marriage may be repudiated where a girl has been abducted by force and married to another without performing sacred rites.⁵ This suggests that, (a) such

1. Apas. II, 5, 11, 15; Vasis. VIII, 1., Vishnu XXIV, 9.

2. Gau. IV, 2, Vasis. VIII, 1., Vishnu ibid.

3. Gau. IV, 3, 5; Apas. II, 5, 11, 15, 16; Vasis. VIII, 2, Vishnu XXIV, 10.

4. Baud. II, 1, 1, 37.

5. Vasis. XVII, 73; Baud. IV, 1, 15.

marriage is voidable and not void and (b) the girl can re-marry like a kanya (maiden), even though the marriage has been consummated.

We turn now to the subject of repudiation of a wife whose marriage as such was not irregular. A wife could be abandoned, after a specified period, who bore daughters only and whose all children die; but a quarrelsome wife could be abandoned without delay.¹ So say the texts, no doubt reflecting custom in some measure. A wife must be abandoned² who surrenders herself to her husband's guru or pupil, who has intercourse with a man of degraded caste, and especially one who attempts to kill her husband but a wife could not be abandoned unjustly.³

The distinction between texts which authorise the husband and wife to be separated (for breach of requirements or qualification of marriage) and texts which authorise a husband to "abandon" his wife is vital. Confusion arises because of the paucity and lack of clarity in the Sanskrit vocabulary used in texts of different ages. The former implies an absolute restriction placed on the choice of a bride or the bridegroom, as the case may be, the breach of which would render a marriage void, where^{as} the latter

1. Baud., II, 2,4,6.

2. Vasis. XXI, 10.

3. Ibid.

points out to the possibility of a divorce or supersession.

What does the word abandon mean here? Does it mean abandoned from sexual intercourse and "joint living" or either of these? The implication seems to be in some cases abandonment from sexual intercourse and in some cases abandonment even from joint living.

The elaborate rules of the sutras show the existence of some sort of matrimonial causes but what was their nature? Did they provide for what we now call supersession, divorce or nullity? We return to the topic later.

IV. "Nullity" in the Arthasāstra:

Kautilya uses the term upāvartara¹ for "nullity", although a marriage performed in one of the first four forms of marriage could on no account be repudiated. A marriage performed in any of the other four forms might apart from any question of nullity be dissolved by mutual consent.² There are eight forms of marriage, viz., Brāhma, (where the girl is offered in marriage clothed with costly garments and ornaments, to a bridegroom, who is specially invited by the father for the purpose), Prājāpatya (where the girl is offered in marriage by the father, with an injunction that

1. Kautilya: Arthasāstra. Ed. by T. Ganapati Shastri, vol.II, p.92.

2. *ibid.*

the couple should perform their religious duties together), Daiva (where the girl is offered in marriage, decked with ornaments, to the officiating priest), Ârsha (where the girl is given in marriage by the father, by pronouncing the words prescribed for making a gift, after accepting from the bridegroom a cow and a bull or two pairs for fulfilment of the sacred law), Gandhârva (where a suitor and the girl fell in love and consummate their proposed marriage), Âsura (where the suitor receives a maiden after paying a reasonable price for her), Râkashasa (where the suitor takes away a girl forcibly after a fight, and marries her) and Paiśācha (where a man seduces a girl while she is asleep, intoxicated or disordered in intellect).¹

We find that in Arthasāstra a husband may be abandoned by the wife under certain circumstances which includes his impotence.² What does Tyājyah,^{٢٥٦} "abandoned" mean here? Does it imply divorce or nullity? Literally it means "abandonable" or "to be abandoned" but it probably denotes separation from conjugal intercourse, as opposed to mokṣa, which might be technical divorce.³ It is not clear whether after "abandoning" her husband she is free to marry again.

1. See Ap. II, ii, 17-21; Gaut. IV, 6-15; Vasis, I, 17-35; Baud. 1, 20, 1-21, 23. Vishnu XXIV 18-28; Manu III, 21; Yajn. 1, 58-61.
2. Kaut. Arthasāstra III, 2, 48 translated by R.P. Kangle, p.231.
3. Jayaswal: Manu and Yajn, p.230.

In some (low) castes she may have been.

In the Arthasastra we find that in the case of marriages of first three varnas (castes) there can be an annulment of preliminaries of marriage including betrothal up to the time the marriage is completed, whereas in the case of sudras the annulment can be made even up to the time of consummation of marriage, partly because of the informality of their preliminaries.¹ We also find that in case of all the four varnas "nullity" is possible even after the marriage is completed where the husband or the wife is impotent.²

V. "Nullity" in the Smritis:

There is conflict as to the age of the Smritis but for our purposes we can say that they were compiled between 500 B.C. to A.D. 300.³ Much of our difficulty stems from the fact that phenomena closely allied to, if not identical, with "nullity" share a vocabulary with matrimonial remedies falling far short of "nullity" in the modern sense. The Sastra is clear on the distinction between "failure to complete" and "undoing" or "annulling", but matrimonial remedies as such have a loose and (perhaps intentionally) confusing vocabulary.

1. Kaut: Arthasāstra: Ed. by T. Ganapati Shastri, vol.II, p.92.

2. *ibid.*

3. Kane, *Hist of DS* Vol I p 246

In Smritis we find certain words which seem to imply "nullity", e.g., Vinivartayet,¹ Vitatha² (in the sense of ~~anulāsa~~^{p. misphala} or void) and dattanāsha.³

The ceremony of marriage is twofold. It consists of choice of the bride or the betrothal which must take place first of all which is succeeded by panigrahana⁴ (the ceremony of joining the bride and bridegroom's hands) and the saptapadi (taking seven steps round the sacred fire) when the marriage is complete.⁵ These ceremonies produce the mental impression that he or she has assumed a new role or that this girl is the man's wife, and wifeness arises from her having undergone the samsakara.

These questions we must consider in order:

- (1) traces of "nullity" from betrothal to consummation of the marriage;
- (2) "nullity" of the marriage arising from infraction of a secular and spiritual grounds for prohibition;
- (3) "nullity" (if this is the correct expression)

1. Manu VIII, 165. See Manu-smriti: Ed. by Vasudeva Lakshmarā Pansikar (6th edn. 1920) at p. 298; See also Manu-smriti: Ed. by Pandit Gopala Sastri at p. 252;
2. Manu cited in A V B. 1952, Bom. L.R. 725 at p. 739.
3. Narada *ibid.* at p.
4. Narada XII, 2.
5. Manu VIII, 227.
6. J.D.M. Derrett: The Discussion of Marriage by Gadadhara at p. 160

arising from dissatisfaction between spouses.

(1) "Nullity" from betrothal to consummation:

(A) "Nullity" of betrothal:

We have to consider whether the problem of nullity arises even before marriage because it might be urged that the girl belongs to the husband after betrothal. From a social point of view this certainly could be urged under Indian conditions, though the law makes careful distinction between betrothal and marriage.

The texts admit that a girl may be abandoned (i.e. betrothal may be annulled) between betrothal and wedding in certain circumstances, e.g.,¹

(a) if she has been given fraudulently; or

(b) when a more suitable suitor presents himself after verbal engagement;² or

(c) if there is an actual fault,³ which in the case of a woman includes affliction with a chronic or loathsome disease, deformity, loss of her virginity and a proved intercourse with another man.⁴

It does not become quite clear how far a proved intercourse with another man differs in import from the loss

1. Manu IX, 72, 73.

2. Nārada XII, 30.

3. Nārada XII, 31.

4. Nārada XII, 36.

of her virginity. It is submitted that a "proved intercourse with another man" means pregnant or who had a child with another man, whereas "loss of her virginity" has the literal meaning.

We even find that a girl may also "abandon" or "give up" (i.e. betrothal is annulled) a suitor if there is an actual fault, which in his case includes madness, impotence, deformity, affliction with a chronic or loathsome disease, loss of caste and that he has forsaken his relatives.¹

Some light on the climate of these ancient textual rules is thrown by the parallel rules answering these questions: what is the effect of retraction of a promise to marry either by the father of a girl or the suitor? What would happen if, a girl is promised in marriage to several suitors, or after accepting a girl in marriage verbally the suitor goes abroad, or a girl's suitor dies after betrothal?

(i) The effect of retraction of a promise:

(a) By the father:

It is considered improper to retract a promise made in betrothal because a breach of a promise is culpable and counts as puruṣānṛta, whose heinousness is thousandfold

1. Narada XII, 36.

that of an ordinary offence.¹ If the father of a girl withdraws his promise to give her in marriage to a suitor, who has no faults of the kind specified which will justify the cancellation of betrothal, he is liable to punishment and must make good the expenses incurred by the discarded suitor.²

(b) By the suitor:

Similarly it seems that if a suitor abandons a maiden after betrothal, who has no faults of the kind specified which will justify the cancellation of betrothal, he has to marry her even against his wishes.³

(ii) Effect of a girl being promised to several suitors:

If a girl has been promised in marriage to several suitors in succession, but is still unmarried, and all the suitors seek her, the suitor to whom the first promise was made should get her. In such a situation the other suitors are entitled to restitution of their presents, if any.⁴

(iii) "The suitor goes abroad":

If, after accepting the offer of a girl in marriage, a suitor goes abroad, the girl should wait for three monthly

1. Manu IX 71; Yajñ. 1, 65.

2. Narada XII, 3,2; Yajñ. 1, 165.

3. Narada XII 35; Yajñ. 1, 66.

4. Kat. quoted in Grihastha Prakesh of Prithwichandra, tras. by J.H. Dave 1953 Bom.L.R. pp.25-31 at p. The same sloka (Aneke¹⁸ rhyo) appears at Grihasthakāṇḍa of Lakṣmīdhara, K.K.T. Ed. by K.V. Rangaswami Aiyangar p.58.

periods and then select another suitor,¹ so says the texts: If within this period she is married to a second person, according to Kat. the marriage is void and the first suitor shall have her.² This is an instance of implied term in contract.

To grasp the point of the implied term and its social reality we must ask whether the period was really three months (in those days of lengthy journeys) or rather three years? The word used is "ritu" which, according to the dictionary,³ means, "any settled point of time", "a period of the year", "a season" (the number of seasons is sometimes limited to three, or sometimes to five, but is more commonly reckoned as six). It also means "menstrual evacuation".

Nand;⁴ arguing from a passage of Baudh.;⁵ takes 'ritu' 'monthly period', as synonymous with 'varsha', 'year'. We find support for this form Vasistha,⁶ and Manu.⁷ According to them a maiden who has attained puberty shall wait to marry for three years and after three years have

1. Narada XII, 24.
2. Kat. quoted in Grihastha Prakesh of Pithurichandra, tras. by J.H. Dave 1953 Bom. L.R. pp.25-31 at p. 31. The same sloka appears at Grihasthakāṇḍa of Lakṣmīdhara, K.K.T. ed. by K.V. Rangaswami Aiyangar pp.59-60 (pūrvam)
3. Monier-Williams: Sanskrit-English Dictionary p.180.
4. Quoted in S.B.E. Ed. by F. Max Müller, vol.7 at p.109.
5. Baudh. IV, 1, 14.
6. Vasistha, XVII, 67,68.
7. Manu IX, 90.

passed, she may marry a suitable husband of her choice. But the analogous passages of Gautama,¹ Vishnu² and Narada³ never have that meaning and indicate "three monthly periods". The question is: Can these passages be reconciled?

The word 'ritu', it is submitted, means three monthly periods and the above passages can be reconciled in the following manner. The concept of pre-puberty marriages coupled with superstition (sic) was behind Narada's view. We know that during the Smriti period child marriages became common. We are told that a girl must be married at or before signs of maturity became apparent⁴ (e.g. appearance of menses) which was, according to the texts, the completion of tenth year.⁵ The age of seven or eight⁶ was considered suitable for a girl to be given in marriage.⁷ The people believed that different Gods enjoyed or possessed a girl at different stages of her physical development, unless she is married, and as if to steal a march on them the parents were anxious to marry their daughters before the marks of

1. Gautama XVIII, 20.

2. Vishnu XXIV, 40.

3. Narada XII, 24.

4. Narada XII, 27. See Sternbach "The Panch^otantra And Smritis" [1950] Bharatiya Vidya p.221-309 at 252-56.

5. Parasara VII, 6; Samvarta V, 66.

6. Yama III 21,22; ~~Mama~~.

7. For evidence of this practice in pre-British times see documents printed at J.D.M. Derrett: "Hindu Law in Goa" Z.V.R. 1965 pp. vol 67, pt 2, pp 203-36

puberty appear.¹ As to the reconciliation of different passages, it is submitted, that a girl shall wait for only three months where the father or the guardian will not marry her even if a suitable suitor is available, whereas she has to wait for three years if the marriage is not possible through their active efforts. Or the different texts refer to different conditions, i.e., a girl betrothed at eight has three years or less before she reaches the danger points of puberty.²

(iv) The effect of suitor's death:

A girl, whose suitor dies after accepting her

1. A Nepalese Manuscript of Narada S.B.E. vol.33 (minor law books part I) p.171 footnote 28: "Soma springs into existence when the marks of puberty appear, and enjoys women. Their breast[s] is a Gandharva, and Agni is said to dwell in their menstrual discharge." [therefore let a father give her in marriage before the marks of puberty have appeared].

The great importance of the notion is proved by the first slokas appearing in the Pancatantra: Ed. by Koregarten 45:5 and 129:5, page 45 slokas

See also Samvarta quoted in Smritichandrika Samskarakanda I Ed. by L.Srinivasacharya p.213. "At the time when (pubic) hairs appears Soma enjoys the maiden. At the time of (first) menstruation a Gandharva, but Agni (fire) at the appearance of breasts. Therefore one should marry a maiden [the law requires the marriage of a "maiden" for a typical dharmic, "righteous", marriage] before she reaches menstruation."

See also Kane: Hist. of Dh.S. vol.II(i) p.443.

2. See Mitak. on Yajn. I, 63,64. trans. by Gharpure vol.II, part I, p.183.

verbally but before the ceremony of marriage, remains technically a Kanya "maiden" under parental control. This will be so even if the betrothal was made with formal libation of water provided she has not been married with mantras.¹ In the case of betrothal leading to an Asura marriage, in which a bride price had been paid, other members of the family of the proposed bridegroom (i.e. his brother) can marry her, if she be willing.²

(B) Nullity of unconsummated marriage:

A distinction has been made between the annulment of a marriage which has been consummated and which has not been consummated. If a girl is married with mantras, but is subsequently discovered to have grave faults, she may be "given up" (i.e. marriage is apparently annulled) if the marriage has not been consummated, but if it has, she must be maintained.³

The question is: what is the effect of concealment of a defect by a suitor, or the girl's father and/or the

1. Yama quoted in G.P. of Prithwichandra, trans. by Dave, 1953, Bom. L.R. pp.25-31 at p.
The same sloka (vacha) appears at Grihasthakanda of Lakṣmidhara: K.K.T. Ed. by K.V. Rangaswami Aiyangar at p.60.

2. Vasistha cited in Grihastha Kanda of Lakṣmidhara K.K.T. ed. by K.V. Rangaswami Aiyangar, pp.60-61; Manu IX 69.

3. Sumantu quoted in G.P. of Prithwichandra, Trs. by J.H. Dave 1953 Bom. L.R. pp.25-31 at p.30.

girl herself? The answer appears to be that ^{if} the suitor conceals his defects and marries a kanya, the marriage may be annulled and the suitor is liable to fine.¹ If the failure to disclose defects, which consisted in withholding the information or misleading the suitor, lies with the girl's father then he is punished,² and the śulka paid by the suitor is returned.³ This rule will not apply in case there are issue,⁴ which suggests that the defects relate to bedworthiness, or are such as waived by intercourse and (ii) the marriage is voidable and not void. Similarly if a girl marries without disclosing her faults and the failure to disclose lies with her the marriage may be annulled.⁵ It may be noted at this stage we are not implying judicial annulment.

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1. Narada and Kat. quoted in G.P. of Prithwichandra.
 2. See Sternbach "The Pañcatanatra and the Smritis" [1950] Bhartiya Vidya pp.227-309. See pp.297-301 at pp.299-300 (where it has been said that if the father or guardian of the girl declares openly all the defects of the girl given in marriage he is not liable to punishment, but if he does not do so, then he will be punished by the King ... and the suitor may annul the contract with this man and abandon, or repudiate the girl who had some defects").
 3. Narada and Kat. quoted in G.P. of Prithwi Chandra. op.cit. Narada XII; 33, Manu VIII 224; Manu IX 73; Yajñ 1, 66. Narada and Manu quoted in G.P. of Prithwi Chandra. Cited above
 4. ibid.
 5. ibid.

(2) "Nullity" arising from infraction of a secular and spiritual grounds for prohibition:

We find that, in Smritis, certain restrictions were placed on the selection of the bride. Great importance was attached to the family during this period and it has been suggested that one should always marry in the best families.¹ These restrictions have been prescribed to ensure health and healthy children, for the well being of the society.

A man is advised not to marry a sapinda,² (belonging to the same particles of the body) sagotra,³ (a sogotra is a relative bearing the same family name, laukika gotra) sāmānapravara⁴ (a savavapravara is one descended from the same Rishi, Vaidika gotra) and brotherless girl.⁵ He is advised to avoid a girl whose family neglects sacred rites and the study^{of}veda.⁶ This advice seems to have been based on several different considerations, or consequences of different importance.

What would happen if the rules prescribed are violated or the advice is not followed? We must make a

1. Manu IV, 244; see also Yama quoted in Sm. C.I. p.78. Asv. gr. 1,5,1; Kamasutra III, 1,2.

2. Manu III, 5. Yajn. 1, 53.

3. Hir. gr. 1, 19, 2; Gobhila gr. III, 4,4.

4. Narada XII, 7; Manava gr. 1,7,8; Varaha gr. 9.

5. Manu III, 110; see also Yajn. 1, 53; Manava gr. 1,7,8.

6. Manu III, 6,7.

distinction between an infraction of a drishtagura doṣa (dosa = fault, blemish). Drishtagura means the qualities being visible (in the sense of secular) and adrishtagura doṣa (spiritual). In the former case the prohibition is only recommendatory. A rule, i.e. that a girl suffering from a disease should not be married will not annul a marriage, if in spite of the rule, the marriage has taken place, whereas in the latter case the prohibition is absolute or mandatory because of an invisible consequence. The prohibition as to the Sapinda, Sagotra, Sapravara marriages come under this category. If such a marriage has taken place, it is void and an expiation is recommended for the husband.¹

(3) Traces of "nullity" arising from dissatisfaction between the spouses:

In order to exclude the possibility that such traces of "nullity" as we have found in the texts might also be paralleled from other instances of separation between spouses, we are forced to look into the whole range of such separation.

We turn to marriages which are not susceptible to the remedies mentioned above. We find provision for superseding, abandoning, "giving up", deserting, expelling and

1. Kane: Hist. of DS. 2(i) 437-438;

banishing a wife. We even find provision for the "abandoning" of a husband, too, under circumstances which we shall examine.

(i) Supersession:

We find that in certain circumstances a wife could be superseded which means that a husband can remarry during the lifetime of a previous wife or wives. The grounds for which a wife could be superseded may be divided into those relating to worldly as well as religious aspects of the marriage.

The grounds relating to worldly aspects are, drunkenness, disease, bad conduct, evil disposition and wastefulness.¹ These grounds are less serious in gravity to the grounds relating to the religious aspect of the marriage.

A wife could be superseded, who was barren, who bore daughters only, all of whose children die, and who has reached atiprasava² (menopause) without bearing any children. These grounds defeat the religious purpose of the marriage since the release of the ancestors from torments after the death is considered to be brought about only by the continuation of the line through sons. But a wife can not be superseded for the above mentioned defects, it is submitted,

1. Manu IX, 80.

2. Manu IX, 81.

unless they are lasting. A sufficient time must be given to the wife to make it clear whether or not the defect is lasting, i.e., the husband must wait ten or eleven¹ years respectively in case where the wife was barren or bore daughters only. The periods are illustrative and must take effect according to the age of the wife, says Lakṣmīdhara.² But a diseased wife who is kind to her husband may only be superseded after securing her permission and must never be disgraced.³ The Smritis show here and there pronounced humanitarian trends for a primitive society.

When a superseded wife goes out of the home in anger she must either be instantly confined or cast off in the presence of the family,⁴ i.e., the prestige of the husband and his family suffers if the initiative is allowed to remain with her.

The husband must provide for her maintenance by a proper arrangement for it has been laid down in a popular verse that the father protects her during maidenhood and the husband guards during youth,⁵ but of course, if she runs away and refuses to come back no maintenance is payable.⁶

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1. Manu IX, 81.
 2. K.K.T. op.cit., at p.104.
 3. Manu IX, 82.
 4. Manu IX, 83.
 5. Manu IX, 3.
 6. Yajn. II, 148.

A distinction, however, has been made for the purpose of payment of /maintenance, between a wife who has no separate property of her own and one who has. In the former case the maintenance allowed is a sum equal to the expenses of her marriage¹ or, according to the interpretation of Laksmidhara,² as much as the new wife receives as wedding gift, i.e., a supplemental amount should be given.

(ii) "Abandon":

A wife could be "abandoned" on grounds which may be divided (as for supersession) into relating to worldly as well as religious aspect of the marriage. In the former category are, drunkenness, bad conduct, disease, insanity, commission of adultery, attempt to kill her husband and commission of a heinous crime including procuring abortion.³ In the latter category are barrenness, birth of daughters only and menopause.⁴ A wife could also (and here we notice the law's failure to make nice distinction between nullity and separation) be abandoned if the marriage was performed by fraud,⁵ i.e., in case of impersonation in which a girl

1. Yajn. II, 148.

2. K.K.T. op.cit., 105.

3. Yama quoted in Sm. Chandrika trans. by Gharpure, p.518.
Harita quoted in Sm. Chandrika trans. by Gharpure, p.519.
Yajn. ibid., at p.519.

4. Devala ibid., at p.520.

5. Manu IX, 72.

other than the betrothed girl is substituted during the ceremony.

A husband should not abandon a wife through infatuation for another woman.¹ He should, also, not abandon a wife who is obedient, of pleasant speech, vigilant, virtuous, and has issue.² (In any case a husband had to bear with a wife, for one year, who hated him).⁴ In case he abandons such a wife he should be punished by the king like a thief. He should be compelled by the king to give one third of his property to the wife whom he desires to abandon. If the husband's property is small, he should be compelled to provide sufficient maintenance for her.⁵ However in a true case of nullity this might not always be instrumental on him.

We find that a wife may be justified in abandoning her husband when he is lost (sic) or presumed dead, when he has become a religious ascetic, when he has been expelled from the caste, or when he is suffering from an incurable or contagious disease and who is impotent⁶ although he may be potent with another woman and impotent with his own.⁷ But in case where the husband goes abroad for some sacred

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1. Devala quoted in Sm. Chandrika trans. by Gharpure, p.517.
 2. Narada XII, 95.
 3. Devala quoted in Sm. Chandrika op.cit., p.517.
 4. Manu IX, 77.
 5. Yajn. Achara 76.
 6. Manu IX 176, Narada XII, 97.
 7. Narada XII, 18.

purpose the wife must wait for him for a specified period.¹

What does "abandon" mean in Smritis? Does it mean nullity? Does it follow that in the true cases of nullity, the wife severed initially all connection with the husband? We have seen how in cases strongly suggestive of nullity (55, 71, 72, 73 ~~also~~) the word "abandon" is used. We, therefore, must inspect, all other contexts in which the word appears. In Smritis "abandon" does not necessarily imply "nullity" because the scope for divorce and/or supersession was so large that need for nullity was small.

(iii) "Give up":

We find that a marriage may be annulled for defects existing. These defects are: blameworthiness, belonging to a different caste, defectiveness on account of committing criminal acts, bad conduct or suffering from an infectious or contagious disease. The expression used is parityajya,² i.e., she should be "given up".

This is an example of the failure in the smriti to distinguish different classes of defect. Whereas "difference of caste" might mean "nullity" in a modern sense, the other grounds suggest a relegation of a less radical kind. But

1. Manu IX, 176.

2. Sumantu quoted in Grihasta Prakash of Prithwichandra trans. by J.H. Dave [1953] Bom. L.R. 25-31 at p.31.

for the possible meaning we must await the general effect of several authorities over the whole range and contexts.

(iv) Deserting:

We find that a wife could be deserted by the husband for a temporary period, i.e., three months (at first it seems utter nonsense) and deprived of her ornaments and furniture, on the following grounds: her being disrespectful to the husband, bad conduct, drunkenness and disease.¹ What does deserting mean? It is submitted that "deserting" means a revocable remedy available to the husband which never has the effect of dissolving the marriage. This is in the nature of temporary separation in the interest of peaceful family life and for the chastisement of the wife.

(v) "Expelling" and "banishing from the town"

We are told that a husband could expel the wife from the house, who always shows malice towards him, or who is unpleasant of speech, or who eats before him.² We also find provision for banishing a wife from the town, who wastes the entire property of her husband under the pretence that it is her stridhana or who procures abortion or who attempts to kill her husband.³ The word expel means, it is

1. Narada IX, 78.

2. Ibid., XII, 93.

3. ibid., XII, 92.

submitted, that the husband shall prohibit the wife from principal habitation and assign her a separate dwelling within his control. This, also, is a temporary separation and never has the effect of dissolving the marriage. The principal difference between "deserting" "banishing" and "expelling" is, it is submitted, as follows: In the former cases the wife during the period of desertion, need not live under the husband's control (i.e., she can go and live with her parents etc.) whereas in the latter case she has to live under his control.

(4) Provisional Conclusion:

In the Smriti period particular care was taken that the girl marries before or as soon as she attains puberty because in this period people were pessimistic with regard to the virtue of a girl and only in marrying at an early age was the virginity of a bride warranted. A marriageable girl, without marrying, living in her father's house was considered to be a Vṛiṣālī (a woman of low caste, also a barren woman). Similarly a father who did not marry his daughter at the proper time was considered to commit a sin.

We find a possibility of annulment of betrothal if either any concealed defect is discovered in the suitor or the girl, i.e., deformity or any gross corporal or spiritual defect on ground of fraud or impotence (see above pp.)

In Smritis a husband was entitled to supersede a wife and maintain her, abandon, desert, expel or banish her. Similarly a wife could also abandon a husband. None of these will appear to be instances of "nullity".

We find that there was a possibility of "nullity" where a suitor had married a sapinda, sagotra or samanapra-vara girl. A marriage could also be annulled where the wife or the husband was impotent or suffered from an infectious or contagious disease or where the marriage was performed by force or fraud.

(vi) "Nullity" in Buddhist texts:

We do not find any specific mention of "nullity" in the Buddhist texts. (~~A.D. 200 ?~~) In the higher section of society divorce was considered unusual, as we know from Kaphadīpāyana-jātaka,¹ where a woman who did not love her husband, when asked by him why she did not take another husband, said that it is not the custom in this family for a wife to take another husband. But in the lower section of society we find evidence of divorce. We find that a woman who refused to return to her husband because he had contracted a second marriage in her absence, was adopted by a king at the request of Buddha, was married off to a nobleman.²

1. J 444 (Book IV) Ed. by Cowell pp.17-22 at p.21.
2. Dhammapada II, 82 and Comm.

We also find reference to a dasi (dancing girl) who had had several divorces in her life.¹ In Majjhima Nikāya² we find a reference to a family where the elders were anxious to divorce a discarded wife even against her wish and to marry her to another man.

We also find certain jatāka³ stories from which we get reference to supersession, i.e., In Ruhak-jātaka, the Brahman chaplain of the king had a wicked wife who made her husband a laughing-stock to everyone, but after realising her wickedness he superseded her and took another wife. In Godh ā-jātaka,⁴ a wife who had been neglected by her husband was advised to forsake him as the bird forsakes a barren tree.

We can conclude that there is evidence of divorce unilaterally and supersession by a husband in the Buddhist texts.

(vii) Nullity in Jaina Law:

There is no specific mention of nullity in Jaina law. However, we find that a betrothal as well as a marriage may be repudiated on grounds which we shall consider. We

1. Therīgatha, 72 and Comm.

2. Vol. IV, p.109.

3. J 191 (Book II) Ed. by Cowell, pp.79-80.

4. J 333 (Book III) Ed. by Cowell, pp.71-72.

find that a betrothal may be repudiated if some defect is discovered in the caste of the bridegroom, or the bridegroom is found to be ill-behaved.¹ There is a difference of opinion whether this can be done before Ṣaptapadi² or before panigrahaṇa,³ (i.e., the joining of the hands).

Jaina law provides information on what could be considered qualifications for marriage. A man is not allowed to marry a Ṣagotra⁴ girl or a girl belonging to a different Varaṇa.⁵ However, subject to local custom, a man may marry paternal aunt's daughter, the daughter of the maternal uncle and the wife's sister.⁶

The question is: what is the effect of not observing the rules laid down for the 'selection of a bride? It appears that some conditions are obligatory, i.e., as to gotra, and some are not. The non-observance of an obligatory condition will have the effect of making the marriage void (see above) whereas in case of non-obligatory condition it will not have the effect of annulling a marriage.'

1. Trivaraṇikâchâra XI, 174 cited in the Jaina law: Champat Rai Jain 44.

2. *ibid.*

3. *ibid* XI, 175 at p.45.

4. *ibid* XI, 3 at p.38.

5. *ibid* XI, 36, 40 at p.38.

6. *ibid* XI, 38 and 175 at p.39.

VIII. Nullity in the Brahmanical legal commentaries:

(1) Concept of nullity:

The concept of nullity and annulment is 'present by the period when our commentaries begin (A.D. 700). Medhātithi¹ uses the term apramāṇī Karaya for nullifying mortgages and sales which literally means "making the deed of no authority in law"; so the phrase really means "Cancelling". Bhāruccin² would use the common term Vinivartana which has been used by Manu³ himself. Medh. also uses the terms nivṛitti⁴ and anuśaya⁵ for 'revoking' the former gift. This is enormously important because nivṛitti in this context means non-effectuating the nature of marriage, whereas anuśaya strictly means "repenting" (see below).

(2) Test of Nullity:

The test of nullity is indicated by Medh.⁶ and Lakṣmīdhara.⁷ The prohibitions against marriage are divided into two categories, e.g., recommendatory and mandatory or absolute. The breach of a prohibition which is only recommendatory does not effect the validity of a marriage. Whereas

1. Medh. on Manu VIII, 165.

2. Bhar on Manu VIII, 165. I am grateful to Prof. Derrett for ref. to Bhar.

3. Manu VII, 165.

4. Medh. on Manu, III, 24.

5. Medh. on Manu VIII, 238.

6. Medh. on Manu III, 11.

7. K.K.T. cited above p. 31.

a marriage performed in breach of mandatory prohibition is a nullity. (See above and below, पृ ७०, ९२)

(3) Nullity of betrothal:

Medh.¹ uses the term niṣphalaṃ -Kuryāt for 'annulling' the betrothal which means 'render fruitless', 'render void of effect'. Medh.² shows that, since na vivāha-kāla eva dānam prāg api vivāhad varana-kāle asti dānam³ (i.e., the ownership of the girl passes from her father to the bridegroom by gift - prior to marriage - at the date of the betrothal) a girl may be tyājyā, "abandoned" for any fault, provided it arise or appear between the betrothal and the wedding. Bhār.'s⁴ commentary is not complete but he only says that "abandonment" must be for a cause.

(4) Distinction between nullity of a consummated and unconsummated marriage:

In the commentaries a distinction has been made between annulling a marriage which has been consummated and one which has not. We find a passage in the Smriti Chandrika⁵ referring to the marriage of a married woman: evam ca vāni referring to the marriage of a married woman: evam ca jāni

1. Medh. on Manu IX, 73.

2. Medh. on Manu IX, 72.

3. Medh. on Manu V, 149.

4. Bhār on Manu V, 149.

5. Smritichandrika: J.R. Gharpure's Bombay Edition (1918) Part I, p.83.

Saṃskārād Ūrdhvaṃ akṣatayanyaḥ punar-udvāha-parāṇī tāni
Yugāntarābhihiprāyaṇīti mantavyaṃ. The words mean, "Thus the
 texts which relate to a remarriage (or second or subsequent
 marriage) of a girl whose Yoni has not been broken [i.e.,
 the marriage has not been consummated] subsequent to the
saṃskāra are to be understood as having reference only to
 previous Yugas" (This is a passage referring to acts for-
 bidden during the Kaliyuga¹ including the remarriage of a
 married woman). If such girls were under consideration, the
 remarriage of a girl whose marriage had been consummated
 was, a fortiori, out of the question. This means, it is
 submitted, that a marriage which has not been consummated
 can be annulled for a cause but a marriage which has been
 consummated can not be so annulled and, it seems, the wife
 should be maintained, i.e., the initiative does not lie
 solely with the husband - as is proper in the nullity pro-
 ceedings. The texts, according to the Commentators, provide
 for nullity without the possibility of the girl's remarriage.
 This is correct since if she has such faults no one would
 want to marry her.

(5) Traces of "nullity" arising from dissatisfaction
between the spouses:

We find certain grounds on which a wife might be

1. As to acts forbidden during the Kaliyuga see Batuknath
Bhattacharya, The Kalivarjyas.

"given up" and a wife or the husband might be abandoned.

(i) "Give up"

If a man marries a Kanya in childhood without knowing her true nature and when grown up he finds out that she has defects, he can by all means, says the Brihan Naradiya¹ give her up. A wife shall certainly be "given up" who has been given by fraud, i.e., who is defective in limb, or has white or other kind of leprosy and is given in marriage while her defects are concealed under her garments or when the fraud consists in one kanya being shown to the bridegroom earlier and another being given in marriage to him - a real possibility where brides appear at the ceremony heavily veiled. In such cases, the gift of that kanya shall be made void by that kanya being returned to the giver because the mantras of panigrahana are inapplicable to akanyas (akanya means one who is no longer a maiden) for in this case the mantras and rites are ineffective,² i.e., the marriage is capable of being annulled.

(ii) "Abandoned"

We find that a wife may be abandoned for three months and "deprived of her ornaments and appurtenances"(sic)

1. Cited in G.P. of Prithwichandra, trans. by J.D. Dave, 1953, Bm. L.R. 25-31 at p. 31.
 2. See Grihasiṭha Prakashaḥ of Prithwichandra, cited above at p.31.

who neglects her husband who is mad, intoxicated or diseased.¹ Manu² uses, tyāga, meaning (according to Medhātithi) temporary separation. This abandonment etc., it is submitted, is for the purpose of bringing her to her senses. Bhār.³ is of the opinion that here the wife should not be sent away from the house although the husband does not have intercourse with her.

We also find that, according to Medh.,⁴ a wife is justified in leaving a husband, who is mad, or an outcaste, or impotent, or seedless (sic) or afflicted with chronic or loathsome disease. The question is: what is the distinction between impotent and seedless because both denote absence of manly vigour? According to Medh.⁵ the difference is that while impotent indicates futility of the seed, seedless implies total absence of virility.

We must answer the questions: What would happen if one gives a girl in marriage without disclosing her defects? What are the faults of a kanya for which nullity is possible? What do anūśaya and "abandon" mean here?

1. Medh. on Manu IX, 78.

2. ibid.

3. Bhār. on Manu IX, 78.

4. Medh. on Manu IX, 80.

5. Medh. on Manu IX, 80.

(6) Effect of non-disclosure of defects:

Medh.¹ infers that one does become liable to punishment if one gives the girl in marriage without disclosing defects. Jha² in his translation improves on the text reading akathayato for kathayato (no doubt rightly). The words are Dattā api adattā bhavati meaning 'the given girl is un-given', i.e., it is null and void as a gift. Thus in his view defects render the marriage voidable and the giver liable to a penalty. If one asks why voidable and not void the answer might be that the gift does not operate as a gift, but if the husband does not repudiate it the girl becomes his wife by his accepting her. Another possibility is that this a transaction which is void until rectified, a peculiarity of Hindu law.³ Bhār.'s⁴ commentary is damaged here, but from the remarks it is perfectly clear that where the defect has been stated, and she has been married, even though she has faults, there is no question of abandoning her (doṣavatyā api parityāgo nāsti). No other commentator on Manu makes this point, but it is evidence of what the śāstra was about A.D. 700.

1. Medh. on Manu VIII, 205.

2. G. Jha: Cited above Vol.IV(2) pp.251-52.

3. J.D.M. Derrett: Introduction to Modern Hindu Law, p.187

4. Bhār on Manu VIII, 205.

(7) Faults of a Kanyā for which Nullity is possible:

Medh.¹ says that faults of a kanyā (for which nullity is possible) are those which are dharmā-prajā-sāmarthyā-Vighāta-hetavah. The last phrase has been translated by Jha² as 'detrimental to morality, to progeny, and to capacity in general'. However, we would translate it as 'Causes of detriment to dharmā or capacity for bearing issue' but Jha's translation may be right. The trouble is that sāmarthyā does mean 'Capacity', but it is not used absolutely (i.e. without capacity for something). According to Bhār³ such fault is a 'disease which obstructs dharmā and offspring' (dharmā-prajā-nirodhina-rogeṇa). There is a cryptic reference to a lunatic bride in Bhār,⁴ but the problem is connected with criminal law and we need not clarify it. Medh.⁵ shows that a sterile wife could be abandoned at the husband's option. In Jha's⁶ translation, 'revoking' of the former gift', the word for revoking is nivṛtti, which we already know (see above p.). In Medh.⁷ "abandonment" is tyāga again and the faulty bride who cannot

1. Medh. on Manu VIII, 224.

2. G. Jha: Manu smṛiti, vol. IV, part II, at p. 272.

3. Bhār. on Manu VIII, 224.

4. ibid.

5. Medh. on Manu VIII, 227.

6. G. Jha: Cited above at p. 276.

7. Medh. on Manu VIII, 227.

be abandoned is one whose faults do not include the fundamental faults dealt with earlier in the commentary, as he immediately shows (see above p.). The simile of the girl with a cloth is amusing. Marriage, according to Medh.,¹ stands on the same footing as 'using', and just as the cloth that has been used and worn out cannot be returned to the seller, so the maiden also who has been married cannot be abandoned. Bhār² on the other hand, argues that even a girl who has had premarital intercourse cannot be abandoned after saptapadi. He very carefully says that a sick girl must not be abandoned if she can attend to dharma and prajanana, but if she can attend to neither of these she should be abandoned, parityājyā. In other words a girl unfit for bearing children, whether because she is impotent or lack of fertility (no menses), can be abandoned, unless,

- (i) the defect is stated beforehand, or
- (ii) intercourse has taken place.

(8) Meaning of anuśaya:

We have seen that for revoking a former gift the word used is nivṛtti whereas anuśaya is also used for "revoking". Thus it is necessary to investigate the meaning

1. Medh. on Manu 227.

2. Bhār on Manu VIII 227.

of anuśaya.

Anuśaya, according to Medh.¹ is "revoking" which means repenting and not actually resiling from. If there is no repenting, how much the less could there be resiling from ~~from~~. The lunatic wife is na tyājya, 'not to be abandoned'. But the girl who is not a virgin is not a wife, so there can be an anuśaya. They may repent and this strongly suggests a voidable marriage, not a void one as the 'not a wife' clause would suggest. He says it is equal to a sapinda marriage, i.e., void. But the word anuśaya strongly suggests an option not to repent. This is typical of the verbal confusion and vagueness tolerated by the Sanskrit sources.

(9) Meaning of "abandon":

What does the word "abandon", tyāga and parityāga mean in Commentaries? Does it mean supersession, or divorce, or nullity? Medh.² defines tyāga as giving up all intercourse with her and forbidding her to do household work. However, "abandon" here unfortunately denotes ^{several} things, namely,

(i) It implies supersession,³ e.g., where the husband abandons an obedient, pleasant speaking, son-bearing

1. Medh. on Manu VIII, 238.

2. Medh. on Manu VIII, 389. trans. by Jha: op.cit., vol.IV (ii) p.413.

3. Mitak on Yajn. III. 76.

and skilful wife. Medh.¹ says that for the wife going off in anger, caused by supersession, there are two optional alternatives in the shape of confinement or divorce. Here Jha's translation needs to be checked. Medh. in fact says tyāga or sampirodha, abandonment or confinement, in that order, are alternatives. Bhār,² Medhatithi's predecessor, says that some people construe the verse so as to show that 'abandonment' means 'cessation of association in prajā-karma, which last we take to mean begetting of offspring and participation in sacred rituals. He insists that neither step should be taken if repugnant to Vedic rituals. Further, the quotation from Brihan-Naradiya,³ in the continuance of the treatment of marriage in Grihasta Prakash of Prithwichandra, is so placed that the sloka immediately preceding it describes the physical and other defects of a girl whom a man might marry. One is advised not to marry such a girl and it does not follow that parityajet refers to nullity. It may well refer to supersession.

(ii) It may imply a divorcium a mensa et thoro,⁴ ~~etc.~~, where the wife is pregnant by another man, or attempts to kill her husband, or commits heinous crimes.⁵ In such cases

1. Medh. on Manu VII, 80.

2. Bhār on Manu IX, 83.

3. trans. by J.H. Dave 1953, Bm. L.R. 25-31.

4. ~~See below, p.~~

5. Mitak on Yajn. III, 72.

she will be abandoned from sexual intercourse and joint living.

(iii) It may mean temporary separation, e.g., where a wife is abandoned for three months for the purposes of reforming her.¹ We will notice that in commentaries also a husband has to bear with a wife who hates him for one year and after one year may deprive her of her property and cease to cohabit. Medh.² commenting on this says that the meaning of the verse is that he shall not turn her out of the house. Though the use of the root 'vas' with 'sam' is not compatible with the accusative ending in 'ēnam; and 'samvasēt', cohabit, would stand for, 'samvasayet', 'allowed to live with' - yet it should be taken to mean 'chiding'. The confiscation of her property also, according to him, is for the purpose of bringing her to her senses; and it does not mean absolute taking away of all her belongings. Bhār³ uses niṣkāraṇam, 'turn her out of the house', 'driving away'. He says that the husband does not have intercourse with her, not that he should send her away from the house. But he notes that another author (anonymous) says this means, tyāga, temporary separation.

1. Medh. on Manu IX, 78; Bhār. on Manu IX, 78.

2. Medh. on Manu IX, 77.

3. Bhār on Manu IX, 77.

(iv) It may imply breach of promise by the suitor, e.g., where the proposed bridegroom abandons a faultless maiden.¹

(v) Lastly, (subject to conditions classified above in Medh. Bhār etc.) it may also mean "nullity", e.g. betrothal may be annulled for a cause or a fault;² a marriage can also be annulled on the husband's option where either the wife is sterile or the bride has fundamental faults.³

IX. Conclusion:

We approach the dharmaśāstra texts as a whole. We find that certain restrictions are placed on the selection of a bride, e.g. a man is advised not to marry a sapinda, sagotra, samanapravara, brotherless girl and a girl whose family neglects sacred rites and study of Veda. We also find that it is considered an imperative duty of the parties to the marriage and their guardians to disclose serious defects of the proposed bride or the bridegroom. These defects include, in case of both the proposed bride and the bridegroom, affliction with a chronic or loathsome disease, insanity and deformity. The fact of loss of a girl's virginity and impotence of the proposed bridegroom are also such defects.

1. Mitak on Yajn.

2. Medh. on Manu IX, 72; Bhār on Manu IX, 72.

3. Medh. on Manu VIII, 227.

The question is: what is the effect of breach or violations of the restrictions? What is the effect of concealment or non-disclosure of defects? What remedies would an ancient or medieval husband or wife need? What remedies, if any, will their relatives want? Was there, ultimately, nullity in the modern sense of the term?

The answer is that if a rule restricting a marriage is driṣṭānta (i.e. secular) it may be ignored, if adriṣṭānta¹ (i.e. spiritual in object) it is imperative. Hence, if a suitor happens to marry a sapinda, or sagotra, or samānapra-
vara girl, the marriage even though performed would be as good as not performed. The reasons being that the character of marriage as a samskāra is determined by scriptural injunction, and a transgression of the injunction means the non-accomplishment of the rite, and the girl can never become the wife of that man. Hence it has been ordained that such a girl, even though she may have gone through the sacramental rites shall be given up, i.e. she must be given up. The result is virtually nullity, but she may have a right of maintenance. The prohibition of marriage with girls belonging to families

<u>driṣṭānta</u> = having a "seen" end	} These are similar concepts.
<u>driṣṭārtha</u> = having a "seen" object	

that may have dropped the sacred rites and so forth is based upon driṣṭaguna doṣa, and, therefore, where such girls are married, the marriage is duly accomplished, the girl actually becomes the man's wife and shall not be given up, i.e., it is not in itself a ground for nullity. The same must be said of other "requirements" that are driṣṭānta, such as marriage with a brotherless girl or with a man who has forsaken his relatives.

If the parties to the marriage and/or their guardians fail to disclose defects of the proposed bride or the bridegroom to the other side and the marriage takes place, the other party can get the marriage annulled. In such cases and cases where the marriage was performed by force (p. 55) or fraud (p. 61) the effect of consummation is vital and may be decisive. Where the marriage has been consummated it can not, despite the defects, be annulled although the wife may be superseded and is entitled to maintenance, i.e., the effect of consummation is to cure the defect.

The most important of all the defects is impotence. The Smritis insisted on careful examination of the proposed bridegroom's fitness for intercourse. A distinction has been made by Narada between curable and incurable impotence. The marriage as well as the betrothal may be annulled if the proposed bridegroom is found incurably impotent. If the

defect is curable a sufficient period will be allowed to pass in order to give time for the cure to have effect. This is on the ground that a gift is no gift which has been given in error or ignorance.¹ The gift of a girl is solely for raising progeny and a person who receives the gift of a girl or is given a girl in the wrong belief that he is potent, but is found not to be so, the gift is no gift.

We find that a marriage performed by force or fraud is voidable. The force may consist in abducting a girl and marrying her against her wishes. In case of fraud it may consist of either impersonation, i.e. a girl other than betrothed is substituted during the ceremony, or in concealing the defects of the proposed bride or the bridegroom. In both the cases consummation makes the marriage valid.

A husband in ancient or medieval times had several remedies open to him. We find provisions for a wife to be expelled from the house, or temporarily deserted, or banished from the town, or "abandoned", i.e. physically separated from the husband, and to be superseded by another wife. A husband could also be abandoned by a wife. The terms "expel from the house", "deserted by the husband" and "banished from the town" amount to more or less the same

1. *Narada* IV, 9.

thing. They mean a temporary separation for the peaceful family life and (if relevant) correction of the wife's behaviour. This is the Commentators view, which "improves" upon the happy-go-lucky notions of the Smritis, some of which, as we have seen, would tolerate divorce and re-marriage. In all the above cases, the implication is that the husband should refrain from sexual intercourse but in exceptional cases, such as where the wife attempts to kill him, he might even abstain from all association with the wife.

The term "abandon" thus denotes several ideas and is not confined to the grounds for nullity or its effects. It means complete or temporary separation from conjugal intercourse or joint living. (91). It may also mean supersession (p. 49), divorcium a mensa et thoro (90) and as we have seen nullity.

In dharmasāstra generally supersession is the remedy preferred by both the husband and the wife and their relatives, because remarriage of a girl was not so easy in practice and since the initiative did not lie with the wife the prestige of the husband and his family suffered if the wife decided to take the initiative, divorce the husband and remarry.

We find that in the dharmastra nullity existed. We also find that there was a distinction between void and voidable marriages. A marriage was void if the parties were within the prohibited degrees of relationship. A marriage was voidable on the grounds of incurable impotence, force or fraud which included fraudulent concealment of impotence, insanity, a chronic or loathsome disease, or any other serious defect of the purporting bride or the bridegroom, and finally non-disclosure of such defects.

(B) Legislative History of nullity of marriage in Hindu Law.

(1) "Nullity" of marriage before 1955:

The Hindu Law of Marriage as laid down by the Smritikaras and the Commentaries in ancient days remained static almost till the advent of the British rule in India as moulded and altered from time to time by custom and usage.¹ The pre-1955 ^{Law} recognised the validity of the marriage of an idiot or lunatic on the footing that the marriage was a samskara.² However, according to Banerjee,³ the idiot or lunatic being (where the loss of reason was complete)

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1. S.V. Gupte, Hindu Law of Marriage, p.2.
 2. See Venkatacharyulu V. Rangacharyulu [1890] I.L.R. 14 Mad. 316-318; Bhagwati V. Parmeshwari [1942] All. 518-589-590. Amrithammal V. Vallimay Ammal [1942] Mad. 807 F.B.
 3. Banerjee, Hindu Law of Marriage and Stridhana (5th edn.) pp.40-43. See also Mayne, 10th edn. 150-3.

incompetent to accept the gift of the bride, which was a necessary part of the ceremony of marriage, it was not easy to understand how their marriage in such a case could be regarded as marriage at all. Similarly, a marriage with a person who was impotent at the time of the marriage was considered to be a nullity.¹ We also find obiter dicta in some cases to the effect that a marriage may be set aside by Courts for force or fraud.² ^mAunjana Dasi V. Prahalad Chandra,³ Norman, J, said,

"I think that the Court must have jurisdiction in such suit to declare the marriage void if procured by force or fraud, and celebrated without the consent of the necessary parties or without the formalities necessary to render it a binding marriage according to Hindu Law." However, as under dharmastra, a marriage solemnized between persons with the degrees of prohibited relationship was void.⁴

The first attempt to introduce element of nullity by legislation was made in 1896. In Madras the Malabar Marriage Act, 1896, was passed, whereby polygamy was forbidden

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1. Rakeya bibi V. Anil Kumar [1948] 1.L.R. 2 Cal.119; Ratarmoni Debi V. Nagendra A.I.R. 1949 Cal.404; A V. B [1952] 54 Bom. L.R. 725.
 2. Aunjona Dasi V. Prahalad Chandra [1870] 6 Bengal Law Reports 243; Venkatacharyulu V. Rangacharyulu [1890] 1.L.R. 14 Mad. 316 at 320; Mulchand V. Budhia [] 1.L.R. Bom. 812.
 3. [1870] 6 Bengal Law Reports 243 at p.254.
 4. Mayne, 11th ed. 144.

if the first marriage was registered and divorce was recognised among those who were governed by the Marumakkattayam or Alliasantana law. This Act was repealed by Madras Marumakkattayam Act, 1932, which prohibited bigamous marriages among Hindus in or outside the then Presidency of Madras who were governed by the Marumakkattayam law of inheritance and among Hindu males whether governed by that law or not who married Hindu females governed by that law. Similarly, the Madras Namboodari Act, 1932, made provision for preventing a Namboodari marrying another woman during the life time of his wife except in certain circumstances.

In 1946, the Bombay Prevention of Hindu Bigamous Marriage Act was passed. Section 4 of this Act provided that, "notwithstanding any law, custom or usage to the contrary, a bigamous marriage shall be void, -

- (a) if it is contracted in this State after the coming into force of this Act.
- (b) if it is contracted beyond the limits of this State after the coming into force of this Act and either or both the contracting parties to such marriage are domiciled in this State.

A bigamous marriage, according to this Act meant¹

1. S.3(1).

"the marriage of a person during the lifetime of his or her spouse, if the marriage of such person with such spouse has not been dissolved, or declared void by a court of competent jurisdiction or has not been dissolved, or is not void according to the custom or usage of the community to which either of the parties to such marriage belongs; but does not include the marriage of a person during the lifetime of his or her spouse, if such spouse at the time of such marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided that the person contracting such marriage shall, before such marriage takes place inform the person with whom such marriage is contracted of the real state of facts, so far as the same are within his or her knowledge."

Similarly, the Madras (Bigamy Prevention and Divorce) Act, 1949¹ and the Madhaya Pradesh² Prevention of Hindu Bigamous Marriages Act, 1955, made bigamous marriages to be void, and punishable under section 494 of the India Penal Code, 1860. The HMA, 1956, repealing the Bombay and Madras acts enacted detailed grounds of nullity.

1. S.4.

2. S.4.

(2) Nullity of marriage under HMA, 1955.

There are two sets of circumstances in which a marriage may be annulled, according to HMA, namely, (i) where there has never been a valid marriage, e.g., where either party has a spouse living at the time of marriage (p. 105 below), or the parties are within the prohibited degrees of relationship or the parties are sapindas of each other (p. 127 below). In such a case the marriage is said to be "null and void"; and (ii) where there has been a marriage which was in its inception valid in all respects, but which has turned out to be so defective, that it is considered in public interest that it ought never to have taken place, e.g., because of the respondent's impotence (p. 163 below), or either party's idiocy or lunacy at the time of marriage (p. 230 below), or where the consent ... was obtained by force or fraud (p. 257 below), or respondent's concealed pregnancy at the time of marriage (p. 321 below). In such a case the marriage is said to be voidable.

The question is: what practical differences are there between a marriage which is alleged to be "null and void" and one which is only alleged to be "voidable". There is lack of comprehensive treatment of the subject, however, following may be said to be a fair account which, it is submitted, may be approved by the Indian Courts.

(a) A void marriage is regarded as never having taken place and can be treated by the parties to it as null without the necessity of a decree. A voidable marriage is valid until annulled by the Court.¹

(b) In a void marriage the decision depends on the ascertainment of facts instantly verifiable at the date of the marriage. In a voidable marriage the decision depends on supervening circumstances.²

(c) The husband and wife are competent to be called as witnesses, in case of a void marriage, against each other but this is not so in the case of a voidable marriage.³

(d) A spouse can allege and prove the fact of marriage being void in any Court at any place if a decision on that matter is relevant to an issue properly before that Court. But the question whether a marriage is voidable can not be raised incidentally in other proceedings.⁴

(e) A void marriage can be put in issue by third parties, whereas a voidable marriage will not be declared null except at the instance of the injured party.⁵

1. T. Rangaswami V. T. Arvindammal A.I.R. 1957 Madras 243 at 249.

Ross Smith V. Ross Smith [1962] 1 All.E.R. 344 at 381 (H.L.), De Renville V De Renville [1948] 1 All.E.R.56.

2. Ross Smith V. Ross Smith [1962] 1 All.E.R. 344 at 381.
3. R.V. Algar [1953] 2 All.E.R. 1381 at 1383; (criminal case); Wells V Fisher [1831] 174 E.R. 34. (civil case).

4. Ross Smith V. Ross Smith [1962] 1 All.E.R. 344 at p.356 (H.L.)

5. T. Rangaswami V. T. Arvindammal A.I.R. 1957 Mad.243 at 249, Wells V Cottam [1863] 3 SW.Tr. 364 = 164 E.R.1316

(f) A void marriage may be declared a nullity at any time but it has been decided that a voidable marriage can not be declared a nullity after the death of the parties, i.e., time may be a bar to the granting of a decree.¹

(g) In case of a void marriage the nature of grounds is immaterial (i.e., whether the petitioner was sincere or not) whereas in case of a voidable marriage a decree will not be granted if it is asked for on grounds that are not sincere.²

(h) Transactions which have taken place during the marriage on the footing that it is subsisting, or in direct contemplation of marriage which afterwards takes place (e.g., ante or post-nuptial marriage settlements) can be affected, by subsequent decree of nullity, in case of a void marriage, but they can not be so affected in case of a voidable marriage.

(i) A void marriage generally can not be ratified or condoned but a voidable marriage may be validated by ratification.⁴

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1. Ross Smith V. Ross Smith [1962] 1 All.E.R. 344 at 356. (H.L.) Dodworth V. Dale [1936] 2 All.E.R. 440; B V. B [1868] PD.559; Inverclyde V. Inverclyde [1931] All.E.R. 39.
 2. Dodworth V. Dale [1936] 2 All.E.R. 440;
 3. See Re Eaves, Eaves V. Eaves [1939] 4 All.E.R.280; See also Fowke V. Fowke [1938] 2 All.E.R. 638.
 4. See J. Jackson, The Formation and Annulment of Marriage, pp.80-84.

(j) A wife alleging a void marriage can rely on her own domicile before marriage but she can not do so in the case of a voidable marriage and must admit, until the case has been decided, that her domicile is that of her husband.¹

(k) In case of a void marriage Lex loci Celebrationis is to be applied to determine the issues but it can not be so applied where the marriage is alleged to be voidable.²

(l) Lastly, in the case of a void marriage the decree merely declares status and is a judgment in rem, whereas in case of a voidable marriage it changes the status and is a judgment in personam.³

1. Ross Smith V. Ross Smith [1962] 1 All.E.R. 344 at 358 (H.L.)

2. ibid.

3. T. Rangaswami V. T. Arvindammal A.I.R. 1957 Mad.243 and 249.

CHAPTER IIBIGAMYI. Introduction:

A marriage solemnized after the commencement of HMA, shall be declared null and void if either party has a spouse living at the time of the marriage¹ and shall be punishable under section 494 and 495 of the Indian Penal Code, 1860.² Section 494 provides that, "whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished.... This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the lifetime of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge."

1. S.11 read with 5(i).

2. S.17.

The parallel provisions of the [Kenya]¹ Hindu Marriage and Divorce Ordinance, 1960, and [The Uganda]² Hindu Marriage and Divorce Ordinance, 1961, provide that, "A marriage solemnized after the commencement of this ordinance shall be void if the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force" and provisions of respective Penal Code shall apply in such a case.

The provisions of HMA appear to have been based on section 19(4) of the Indian Divorce Act, 1869, and section 24(1)(i) read with section 4(a) of the Special Marriage Act, 1954. The provisions of the Uganda Ordinance corresponds to parallel provisions of the Kenya Ordinance except for the difference in section number of the Penal Code.³

The constitutional validity of the provisions not allowing second marriage has been challenged as contravening the fundamental rights guaranteeing, equality before law and equal protection of law,⁴ prohibiting discrimination on grounds only of religion, race, caste⁵ etc. and providing for freedom of conscience and free profession, practice and

1. Cap. 157. S.7(3); Cap.157 S.11(a)(i).

2. S.7(1).

3. S.171 of the Kenya Penal Code and S.170 of the Uganda Penal Code.

4. Article 14 of the Constitution.

5. Article 15 of the Constitution.

propagation of religion.¹ In Ram Prasad V State of U.P.² this argument was, however, rejected where Kidwai, J, held that, "the act of performing a second marriage in the presence of the first wife can not be regarded as an integral part of Hindu religion nor can it be regarded as practising or professing or propagating Hindu religion..."

II. Essential requirements:

In order to obtain relief under the clause the petitioner has to "satisfy" the Court, on the following matters:

- (1) There must be a spouse living at the time of the marriage;
- (2) The second marriage must be a form of marriage recognised by law.

(1) "... spouse living ..."

The question is: what does the term "spouse living"

1. Article 25 of the Constitution.

2. A.I.R. 1957 All.411 at p.414. See also The State of Bombay V Narsu Appa A.I.R. 1952 Bom. 84 (a case under Bombay Prevention of Hindu Bigamous Marriage Act, 1946, where Chagla C.J, observed (at p.86) that, "... a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole". See also Hisnam V Oughi A.I.R. 1959 Manipur 20.

imply? We know that a person whose former marriage with the party in question has been terminated by death or dissolved by divorce or declared void or annulled is not a "spouse living" for our purposes, i.e. there is no prior valid subsisting marriage.¹ However, we must answer the questions: whether a person who marries in contravention of section 15 HMA, which limits the capacity of a recently divorced person to marry, has a spouse living? Is a spouse entitled to rely on the presumption of death² of the other spouse where the other spouse has not been heard of as alive for seven years by those who would normally expect to hear from or about him or her if he or she were alive and marry again, without informing the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge,³ without fear of committing bigamy?

(i) Marriage in contravention of section 15 HMA:

Section 15 provides that when a marriage has been dissolved by a decree of divorce and either there is no

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1. See Janki V Parmeswaran A.I.R. 1955 N.U.C. (Tra-C.) 4132. Binoy V Satish A.I.R. 1927 Cal. 480, 481, (where a girl was given in marriage by mother with the consent of the father who was in jail. The girl subsequently married another person. It was held that the first marriage was a valid marriage.
 2. S.108 Indian Evidence Act.
 3. See S.494 Indian Penal Code.

right of appeal against the decree [superfluous words in view of section 28 HMA, according to which all decree and orders made by the Court in any proceeding under HMA may be appealed] or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of the first instance.

Section 15 appears to have been modelled on section 13(1) of the [English] Matrimonial Causes Act, 1950 re-enacting section 12(1) of the Matrimonial Causes Act 1937. In the parallel provisions of the Indian Divorce Act, 1869¹ and the Special Marriage Act, 1954² the words used are "but not sooner". However, the period prescribed is, respectively, six months and one year.

The general principle appears to be that a marriage solemnized in contravention of the rules laid down by section 15 is void and should be so declared when the

1. S.57.

2. S.30.

opportunity is presented regardless of whatever changes may have resulted from it or how long it may have endured.¹ However, it is submitted that, the Court may refuse to so declare if it seems inequitable or against public policy to do so, for the capacity of a recently-divorced person to marry has been limited "to prevent confusion of paternity rather than hasty or collusive divorces intended speedily to facilitate fresh marriages."

In Chister V Mure² a case under section 57, MCA, 1857, and Rogers V Halmshan³ it was held that a second marriage contracted within the time limited by section 57, MCA, was totally void. Similarly, in Noble V Noble,⁴ a marriage contracted between decree nisi and decree absolute was held by Lord Penzance to be bigamous.

Jackson V Jackson⁵ appears to be the first Indian case on the question, where the successful petitioner in a suit for dissolution of marriage entered into a second

1. See S.V. Gupte, Hindu Law of Marriage, p.108; P.V. Deolalkar, The Hindu Marriage Act, 1955, pp.36-7; J.D.M. Derrett, Introduction to Modern Hindu Law, p.164; D.H.Chaudhry, The Hindu Marriage Act, 1955, 82; See also S. Venkataraman, "Remarriage After Divorce Under the Hindu Marriage Act" [1958] S.C.J.(J).
2. [1863] SW and Tr. 223 = 164 E.R. 1259.
3. [1864] 3 SW and Tr 509 = 164 E.R. 1373.
4. [1869] L.R. 1 P and D.691.
5. [1911] 1 L.R. 34 All. 203.

marriage within six months of the decree for dissolution of marriage becoming absolute, it was held¹ by Chamier, J, following Sir James Hannen, P,'s observations in Warter V Warter² that, "The Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties to the marriage can be released from their incapacity to contract a fresh one," that the second marriage was void. Similarly, in Battie V Brown,³ following Jackson V Jackson,⁴ the petitioner asked for a decree of nullity of the marriage on the ground that the marriage was null and void as having been contracted within six months of the date on which a decree absolute had been passed dissolving the earlier marriage of the respondent. Wallis, J, not only declared the marriage void on the date when it was solemnized, but also that the previous marriage was still "in force" within the meaning of S.19(4) Indian Divorce Act 18. The learned judge gave his reason in the following terms,⁵ "... the former marriage is to be considered still in force at any rate to the extent of preventing a subsequent marriage during

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1. Jackson V Jackson [1911] 1.L.R. 34 All. 203 at p.204-5.
 2. [1890] L.R. 15 P and D 152 at 155.
 3. A.I.R. 1916 Mad. 847.
 4. Cited above.
 5. Battie V Brown A.I.R. 1916 Mad. 847 at 848.

the lifetime of the other party to such marriage until the prohibition resulting from the survival of such other party is removed by virtue of the section. Now the prohibition is not removed by virtue of the section till the lapse of six months, or the happening of the other event therein mentioned.¹ In Turner V Turner,¹ a similar case, Sanderson, C.J., following Warter V Warter observed that,² "In my judgment, therefore, by reason of the provisions of section 57 and of the fact that the time specified by section 57 had not elapsed from the date of the High Court confirming the decree nisi, the marriage with the petitioner's former wife was in force on ... the date on which the petitioner went through the form of marriage with the respondent ...". In this case Woodroffe, J, went to the extent of suggesting that,³ "... where a minister licenced to solemnise marriages is made aware that there has been a previous marriage which has been dissolved he should require that the decree absolute should be produced before him so that he may see whether the period of six months prescribed by law has elapsed". In Nagabhushanam V Nagendramma,⁴ a case under Madras Hindu (Bigamy Prevention and Divorce) Act, 1949,

1. A.I.R. 1921 Cal. 517.

2. *ibid* at p.518.

3. Turner V Turner A.I.R. 1921 Cal. 517 at 519.

4. A.I.R. 1955 A.P. 181 at 183.

Chandra Reddi, J, (following Battie V Brown) held that, "It follows that a second marriage solemnized within six months from the date of the alleged divorce is void." However, the effect of section 15 may be avoided by ~~taking~~^{preferring}, "where it is available, recourse to a caste tribunal to a divorce court, for the decision of caste tribunals is validly given normally terminates the marriage and sets the former spouses free to marry again without delay if they wish."¹

(ii) When marriage may not be void:

The Court may not declare a marriage^{void}, solemnized in contravention of section 15, HMA, where to do so would be inequitable or against public policy. This would include a case where any of the parties to the dissolved marriage dies after the decree for divorce but before the expiration of one year from the date of the decree.² In this case, since the death terminates the marriage it would be against public policy to declare the marriage void. This may be illustrated by Wickham V Wickham,³ where A obtained a decree nisi, by reason of her husband's cruelty and adultery. Her solicitor told her on the day of the decree nisi was pronounced that her attendance would not again be required;

1. J.D.M. Derrett, Introduction to Modern Hindu Law, p.164.

2. S.V. Gupte, Hindu Law of Marriage, p.211; see also P.V. Deolalkar, The Hindu Marriage Act, 1955, pp.127-8.

3. [1880] 6 P and D 11.

that the making of the decree nisi absolute was a matter of form, and he would attend to it. On the belief that all things necessary had been done, and that the decree nisi had been made absolute, the petitioner went through a ceremony of marriage, before decree absolute, with another man. She did not become aware until quite some time, that the decree nisi had not been made absolute, and that her second marriage consequently was invalid. In this case the Court made the decree absolute. It has been rightly suggested by Mr. Gupte,¹ that "An amendment of this section [S.15] seems to be therefore necessary to clarify that any of the parties may remarry on the death of the other of them or on the expiry of the period mentioned in the section, whichever is earlier."

(iii) "Presumption of death"

A spouse is entitled to rely on the presumption of death of the other spouse and marry again without committing bigamy if the other spouse has not been seen or heard of for at least seven years by persons likely to have heard of him if alive.² Similarly, it is submitted that, if a married person whose other spouse has disappeared and who desires

1. S.V. Gupte, Hindu Law of Marriage, p.211.

2. S.494 Indian Penal Code, 1860.

J.D.M.Derrett, Introduction to Modern Hindu Law, p. 225.

to marry again such a spouse may, after making all possible inquiries, remarry, provided that nothing has happened within that time to give that spouse reason to believe that the other party was then alive, for the Court, in any future proceedings, will regard a marriage contracted with proper formality as binding in the absence of evidence to the contrary. However, if the first husband reappears the second marriage would be a nullity.

This proposition may be supported by Spurgeon V Spurgeon¹ and Tweney V Tweney.² In Spurgeon V Spurgeon³ the question arose whether the Court could grant a decree of dissolution in respect of a second marriage in the case of a petitioner who had married again after her first husband had disappeared and she did not know whether he was alive or dead. It was submitted on behalf of the petitioner that

"the Court could grant a decree, notwithstanding the fact that, despite exhaustive inquiries, it was not definitely known whether the first husband was alive or dead. There was a certificate of the second marriage which, coupled with subsequent cohabitation, was a prima facie evidence of a valid marriage, and it would certainly be binding as

1. [1930] 46 T.L.R. 396.

2. [1946] 1 All. E.R. 564.

3. [1930] T.L.R. 396 at 396.

against the petitioner if in any Court she attempted to say that the second marriage was a nullity..." Bateson, J, accepted this argument and granted a decree nisi.

In Tweney V Tweney¹ the wife petitioned for dissolution of a second marriage on the ground of desertion. Her husband by the previous marriage had disappeared six months after that marriage and nothing had been heard of him again notwithstanding exhaustive inquiries. The question for determination was whether, in the absence of evidence that the previous husband was dead at the date of the second marriage, the Court had jurisdiction to dissolve it as a valid marriage. Pilcher, J, arriving at the conclusion that the second marriage was a valid marriage, observed that,²

"The way in which the matter should be regarded is in my view this. The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity. The position with regard to the evidence is that I am quite satisfied that the petitioner herself, during the years which intervened between the time when she was deserted by her first husband and the time she married her second husband, made every reasonable

1. [1946] 1 All. E.R. 564.

2. Tweney V Tweney cited above at p. 565.

effort to ascertain the whereabouts of her first husband.... There is no question that the marriage between the petitioner and respondent was attended by all proper formalities. This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact."

(2) ... form of marriage recognised by Hindu Law:-

The question is whether the words "marries"¹ and "solemnized"² implies going through any form of marriage or a marriage performed according to a form recognised by the law of the place where it was celebrated. It is submitted that it implies a marriage solemnized with all the essential ceremonies which are necessary to be performed in order that a valid marriage may take place. The proposition may be illustrated with the help of Kalan V Emperor,³ Swapna V Basanta⁴ and Malan V State of Bombay.⁵

In Kalana V Emperor,⁶ Davis, J.C., thinking that it is not sufficient for the prosecution merely to show that something which the prosecution prefers to call "some form

1. S.494, Indian Penal Code, 1880.

2. S.17, HMA.

3. A.I.R. 1938, Sind 127.

4. A.I.R. 1955 Cal. 533.

5. A.I.R. 1960 Bom. 393.

6. Kalan V Emperor A.I.R. 1938 Sind 127 at 128. See also Sant Ram V Emperor A.I.R. 1929 Lah. 713; Emperor V Soni A.I.R. 1936 Nag. 13.

of marriage ceremony" was gone through, observed that,

"We think it necessary for the prosecution to prove that the form of marriage was a form recognised by or known to the law, otherwise it would be open to the prosecution by mere assertion to constitute any mutual act on the part of the man and woman to form a marriage. For instance, taking an absurd example, ... if the complainant chose to come forward and say that the man and woman held hands while the man crowed like a cock and the woman clucked like a hen, that was a form of marriage ... when the word "marries" is used in S. 494 I.P.C. it means marries by some form of marriage known to or recognised by the law. S.494, when it uses the word "marries" does not of course refer to a valid marriage". In Swapna V Basanta¹ where A, an Indian Christian and having a Christian wife living, marries again a Hindu woman according to Hindu rites ^{the latter marriage} was held to be void² "not because of the existence of the Christian wife ... but because of the fact that there can not be a valid form of marriage between an Indian Christian and a Hindu woman celebrated according to Hindu rites." Renupada Mukerjee, J, was of the opinion that,³ "... in order that a person may be convicted of an offence of bigamy, the second marriage

1. A.I.R. 1955 Cal. 533.

2. ibid at p.534.

3. ibid.

must be a form of marriage recognised by law otherwise it would simply be an adulterous union...". Similarly, in Malan V State of Bombay,¹ Miabhoy, J, laid down the following test to be followed in a case under question,

"In order that an offence under S.494 may be committed it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife."

The Supreme Court of India considered the meaning of "solemnize" in Bhau Rao Shankar Lokhande V The State of Maharashtra² where it was urged by the appellants that in law it was necessary for the prosecution to establish that the alleged second marriage of the appellant had been duly performed in accordance with the religious rites applicable to the form of marriage gone through. It was also contended by the appellant that the essential ceremonies for a valid marriage were not performed. On behalf of the State it was urged that the proceedings of that marriage were in accordance with the custom prevalent in the community of the appellant for Gandharva form of marriage and that, therefore,

1. A.I.R. 1960, Bom. 393 at 305.

2. [1965] Bom. L.R. 423 (S.C.) २५२५

the second marriage of appellant was a valid marriage. It was also urged for the State that it is not necessary for the commission of the offence under S.494, Indian Penal Code, that the second may be a valid one and that a person going through any form of marriage during the lifetime of the first wife would commit the offence ... even if the later marriage be void according to the law applicable to that person.

^{Ch}
Raghunath Dayal, J, delivering the judgment of the Court (^{which included} Mudholkar, J, and Ramaswami, J,) observed,¹ as to the meaning of 'solemnize', "The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is "Celebrated or performed with proper ceremonies and due form' it can not be said to be 'solemnized'. It is, therefore, essential for the purpose of S.17 of the Act, that the marriage to which S.494, Indian Penal Code, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not take the

1. Bhaurao Shankar Lokhande V The State of Maharashtra
[1965] Bom. L.R. 423 at 424.

ceremonies prescribed by law or approved by any established custom."

Raghubar Dayal, J, considering the argument that it is not necessary that the second marriage be a valid one and that a person going through any form of marriage during the life time of the first wife would commit the offence under S.494, Indian Penal Code, came to the conclusion that,¹

"Prima facie, the expression 'whoever ... marries' [in S.494 Indian Penal Code] must mean 'whoever ... marries validly' or whoever ... marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage

1. Bhaurao Shankar Lokhande V The State of Maharashtra [1965] Bom. L.R. 423 at 425. See also Emperor V Manju A.I.R. 1948 Bom. 374 (where it was held by Chagla, C.J., observed that "... Mr. Shanbhag [the Counsel for the accused] has taken the point that the prosecution case was that this marriage was contracted according to the Gandharva form and that that form is obsolete to-day under Hindu law, and that, therefore, no marriage at all was in fact contracted and, therefore, no offence was committed. Now, it is important to note that both the accused admitted having been married. They do not say that they have not contracted marriage, and the law with regard to bigamous marriage is clear that it is not necessary in order to commit an offence that a valid second marriage should be solemnised. It is enough in law if the parties accused of bigamous marriage go through a form of marriage when the first marriage is still subsisting.") It is submitted that, in view of Bhaurao's Case [1965] Bom. L.R. 423, This case is of doubtful authority.

is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife."

III. Approbation of a bigamous marriage:

The question is: can there be approbation of a marriage preventing a party ^{to} ~~rely on~~ on a plea that a marriage was void on the ground of bigamy. It appears that such a marriage may be approbated if the wife marries on the presumption of death of the first husband and at the time of the marriage the husband knew all the circumstances concerning the wife's earlier marriage. Thus, he is estopped from raising the question of validity of his marriage. However, "it is distinctly advisable, in view of the ease with which petitions may be presented under the HMA, that a marriage should be dissolved where the spouse has been missing for seven years, whenever remarriage is contemplated."¹

Lord Merriman, P, in Bullock V. Bullock² observed, obiter, that, "... it is not universally true ... that

1. J.D.M. Derrett, Introduction to Modern Hindu Law, p.226.
 2. [1960] 2 All.E.R.307 at 310.

estoppel is prevented from operating merely because a bigamous marriage is involved." In Bullock V. Bullock,¹ in 1921 the wife married one K. There were two children and in 1926 K deserted his wife. In 1929 the wife obtained an order in the magistrates court for the payment by K of maintenance for herself and the children on the ground of K's desertion. In 1930, K being in arrears under the order, a committal order was made. A warrant was issued against K, to the police but was not executed by them as K. could not be found. The wife made no further inquiries about K. and never heard of him again. In 1944, the wife describing herself as the widow of K., went through a ceremony of marriage with the husband. At the date of the marriage the husband knew all the circumstances concerning the wife's earlier marriage with K. In 1959 the wife applied by way of complaint in the magistrates' court for an order for the payment by the husband of maintenance for herself on the ground of his desertion. The husband contended that there was no jurisdiction to make any order since his marriage to the wife in 1944 was bigamous and void ab initio. As the lapse of time since K. was last heard of was, now, thirty years and, in 1944, had been fourteen years, the magistrates inferred that K. died before the wife's re-marriage in 1944 and made an order in the wife's favour. The husband appealed on the ground that, as the wife had made no inquiries about K., his

1. [1960] 2 All.E.R. 307.

death before her marriage should not be inferred. It was held that the inference that K had died before the re-marriage in 1944 was rightly drawn because (i) of the lapse of time between the date when K was last heard of and the date of the re-marriage (a period of fourteen years) and of the present proceedings (a period of thirty years), and (ii) of the fact that the police were unable to execute the warrant against K. issued to them, which met the objection that the wife had herself made no inquiries concerning K. Lord Merriman, arriving at the above conclusion referred to Wilkins V. Wilkins,¹ Woodland V. Woodland² and relied on Re Watkins, Watkins V. Watkins.³

Wilkins V. Wilkins,⁴ was a suit for nullity by the husband but during the subsistence of the so-called marriage the wife had petitioned for judicial separation on the ground of the husband's adultery. The husband by his answer denied the adultery and alleged that at the time of his marriage to the petitioner she had a husband living. At the trial the jury found that the husband had committed adultery, and also that at the time of the marriage the first husband was dead. In fact he turned up some thirty years later, and

1. [1896] P.108.

2. [1928] All.E.R. 690.

3. [1953] 2 All.E.R. 1113.

4. [1896] P.108.

the husband applied to the Court of Appeal to deal with the situation, which could only be dealt with, the Court of Appeal held, by getting rid of the original finding which obviously, in effect constituted estoppel per rem judicatum, i.e. it is plain, as was observed by Lord Merriman, P.¹ that, "unless this new trial be set aside, the husband would have been estopped from denying the validity of the marriage ..." Similarly, in Woodland V. Woodland,² a husband was praying for a nullity decree on the ground that his marriage was bigamous, the wife having a husband living at the date of the marriage. There had been an earlier suit by the wife for restitution of conjugal rights, which involved the usual finding that the parties were husband and wife and which preceded, naturally, on the basis of their status being thus, conclusively established inter partes. A decree of restitution of conjugal rights was granted. The Court implicitly relied on Wilkins V. Wilkins,³ and the only difference between the two is that there was no appeal to the Court of Appeal to set aside the original decision which operated as estoppel. Accordingly, the husband's petition was dismissed.

1. Bullock V. Bullock [1960] 2 All.E.R. 307 at 310.

2. [1928] All.E.R. 690.

3. [1896] P.108.

In Watkins V. Watkins¹ a case under Inheritance (Family Provision) Act, 1938, Harman J., paid marked attention to the lapse of time, which was something in the neighbourhood of twenty-two years, notwithstanding the fact that, though other people were said to have made inquiries and given evidence, the wife herself, who had been in touch with the husband's relatives at one time, had never apparently even discussed with them, and had herself made no independent inquiries at all. Harman J., however, found that she was in fact a widow, quite clearly basing his decision mainly on the long lapse of time.

IV. Bigamy in Kenya and Uganda:

The use of the expression "a marriage solemnized..." in the Kenya and Uganda Ordinance implies that, in order that a marriage may be bigamous, there must not only be a prior subsisting valid marriage but the second marriage must be solemnized in due form and with proper ceremonies.

The principles stated above may generally be applied to a case of bigamy under the Kenya or Uganda Ordinance.

1. [1953] 2 All.E.R. 1113.

CHAPTER III

DEGREES OF PROHIBITED RELATIONSHIP AND SAPINDASHIP

I. Introduction

A marriage shall be declared null and void, under HMA, by a decree of nullity where the parties are within the degrees of prohibited relationship¹ or where the parties are sapindas of each other,² unless the custom or the usage governing each of them permits of the marriage between the two. In the parallel provisions of Kenya³ and Uganda⁴ law the expression used is "prohibited degrees of consanguinity".

The former provisions of HMA are based partly on the pre-1955 law and partly on the Special Marriage Act, 1954,⁵ whereas the latter are based on one hand on the dharmastra and on the other on pre-1955 law and the SMA.

It may be noted that for the purposes of marriage degrees of prohibited relationship or sapinda relationship includes:⁶

- (i) relationship by half or uterine blood as well as by full blood;

1. S. 11 read with S(5)(iv).

2. S. 11 read with S(5)(v).

3. Cap.157. S.11(1)(a)(ii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960.

4. S. 9 (3)(a) read with Cap 113 S.13(1) of [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.

5. J.D.M. Derrett, Introduction to Modern Hindu Law, p.157.

6. S. 3 HMA expla to Cl. F and G.

- (ii) illegitimate blood relationship as well as legitimate;
- (iii) relationship by adoption as well as by blood; and all terms of relationship [degrees of prohibited or sapindaship] shall be construed accordingly.

It is interesting to note that it is a punishable offence, under HMA, to 'procure' the solemnization of one's own marriage in contravention of the law relating to degrees of prohibited relationship and sapindaship.¹ The dictionary² defines procure as to bring about, cause, effect or produce. The question is what is the nature of this clause, i.e. whether it is absolute? Can ignorance of law be excused, since the question whether one is within degrees of prohibited relationship or sapindaship is a matter of law? It appears that this clause is absolute, and hence a person may 'procure' the marriage though the person is unaware that the other party is within the degrees of prohibited relationship or sapindaship or that custom did not take the parties out of the rule.³ Similarly, it appears that since whether a person is within the degrees of prohibited relationship or sapindaship is a question^{of} law, its

1. S. 18(b).

2. Murray: A New English Dictionary, Vol.7(2) at 1418.

3. J.D.M. Derrett, 161-2.

ignorance can not be excused, for Parliament imposed, for the first time, a penalty on 'procuring' a void marriage the Act must be construed strictly, and it appears that mens rea is not required.¹ However, Mr. Gupte² thinks that perhaps such ignorance might be excused.

The reasons for the rule prohibiting a marriage on the ground of prohibited degrees of relationship or sapindaship may be classified into moral, social and physical.³ However, basically the reason for the prohibition

1. J.D.M. Derrett, cited above, p.162.

2. S.V. Gupte, Hindu Marriage Act, p.216.

3. Bentham: Principles of the Civil Code, part III, Chapter V, Sec. 1, ~~and~~. "If there were not an insurmountable barrier between near relations called to live together in the greatest intimacy, this contact, continual opportunities, friendship itself and its innocent carresses might kindle fatal passion. The family ... would itself become a prey to all the inquietudes of rivalry, and to all furies of passion. Suspicions would banish confidence - the tenderest sentiments of the hearth would be quenched - eternal enmities or vengeance, of which the base idea is fearful, would take their place. The belief in chastity of young girls, that powerful attraction to marriage, would have no foundation to rest upon; and the most dangerous snares would be spread for youth in the very asylum where it could least escape them..."

Golapchandra Sarkar Sastri, A treatise on Hindu Law: [6th Edn. by R.N. Sarkar] p.127 "... The joint family system ... accounts for the prohibition by the Hindu sages, of marriage between a large number of relations than by other systems of jurisprudence ... those relations that are called to live together in the greatest intimacy from their birth, as well as those, one of whom stands in loco parentis to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition, so that the belief in the chastity of young girls, that powerful attraction to marriage, may be maintained unshaken..." See observations to the similar effect in Narayana Ayar: The History of Ancient Law, p.170.

appears to be as follows: The joint family is the normal condition of Hindu society and a marriage between the persons having the same particles of a body inhabiting under the same roof appeared to be repugnant to the Hindu law givers. Thus in order to guard against the possibility of incestuous intercourse it became imperative to place restrictions on the choice of the bride and attaching religious sanctions to them.

II. Degrees of prohibited relationship:

(1) Meaning:- The HMA defines "degrees of prohibited relationship" in the following terms:

"Two persons are said to be within the "degrees of prohibited relationship" --

- (i) if one is a lineal ascendant of the other;¹ or
- (ii) if one was the wife or husband of a lineal ascendant or descendant of the other;² or
- (iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other;³ or
- (iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers and sisters.⁴

1. S.3(g)(i) HMA.

2. S.3(g)(ii) HMA.

3. S.3(g)(iii) HMA.

4. S.3(g)(ii) HMA.

(1) Lineal ascendant:

This sub-clause covers a wide field for no limit to lineal ascendancy is fixed. A person, under this Clause, may be within the prohibited degrees of relationship to a person who is more than five degrees (inclusive) removed in the line of ascent through the father and three degrees (inclusive) removed in the line of ascent through the mother, i.e., persons within the degrees of 'prohibited relationship' may not marry even though they may not be sapindas (with or without the aid of custom derogating from statutory rules).¹

It may be noted that under this subsection a man is said to be within degrees of prohibited relationship with mother, mother's mother, father's mother, father's father's mother, father's mother's mother, daughter, daughter's daughter, daughter's son's daughter, son's daughter, son's son's daughter, son's son's son's daughter.²

Similarly, a woman is within prohibited degrees of relationship with her father, father's father, father's father's father, father's father's father's father's father, father's mother's father, mother's father, father's mother's father's

1. J.D.M. Derrett, Introduction to Modern Hindu Law, p.161.

2. S.V. Gupte, Hindu Marriage Act, 99.

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father, father's mother's mother's father, son, son's son, son's son's son, son's son's son's son, son's daughter's son, daughter's son, daughter's son's son, daughter's son's son's son and so on.¹

(ii) If one was the wife or husband of a lineal ascendant or descendant of the other:

This sub-clause covers certain relations by affinity, e.g. in case of a man, paternal grandmother, paternal great grandmother and so on, son's wife, daughter's son's wife, daughter's daughter's son's wife, daughter's son's son's wife, son's son's wife, son's son's son's wife, son's daughter's son's wife and so on, in the case of a woman her maternal grandfather, maternal great-grandfather, father's mother's husband, father's mother's mother's husband, father's father's mother's husband and so on, daughter's husband, daughter's daughter's husband, daughter's son's daughter's husband, daughter's daughter's daughter's husband, son's daughter's husband, son's daughter's daughter's husband, son's son's daughter's husband, son's daughter's son's daughter's husband and so on.² A stepmother, it

1. S.V. Gupte, ^{Law ex} Hindu Marriage Act, 99.

2. Ibid.

appears, is also excluded.¹

The use of the word "was" in this sub-clause suggests that the terms "wife" or "husband" would include a former wife or husband, whether the marriage was terminated with death or by divorce.²

(iii) If one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other:

A man will be, under this sub-clause, within prohibited degree of relationship with his brother's wife, father's brother's wife, mother's brother's wife, grandfather's brother's wife, grandmother's brother's wife.³

The use of the word "was, like in sub-clause (ii) above, suggests that the former wife, whether the prior marriage was terminated with death or by divorce, of the brother or paternal or maternal uncle, or any paternal or maternal grand-uncle is also excluded. There is no statutory bar, it appears, to a marriage with the former husband of a sister, nor the former husband of the father's or mother's sister.⁴

1. J.D.M. Derrett, Introduction to Modern Hindu Law, p.161.

2. See Gupte, cited above; J.D.M. Derrett, cited above, Deolalkar, cited above.

3. S.V. Gupte, Hindu Marriage Act, 100.

4. J.D.M. Derrett, Introduction to Modern Hindu Law, p.161.

- (iv) If the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers and two sisters;

Under this sub-clause certain relations are excluded who are related collaterally, e.g., in case of a man, sister, brother's daughter, father's sister, mother's sister, father's brother's daughter, sister's daughter, mother's sister's daughter, father's sister's daughter and mother's brother's daughter; in the case of a woman, brother, father's brother, brother's son, sister's son, mother's brother, mother's brother's son, father's sister's son, mother's sister's son, father's brother's son.¹

III. Sapinda

(1) The question is: what precisely is the meaning of sapinda and how it can be determined?

(a) Meaning of sapinda:

The expression sapinda has been variously interpreted, although giving the same derivation e.g., Samanah Pindaḥ Yesṣam Te Sapiṇḍah under the Mitākshâra and Dâyabhâga schools.²

1. S.V. Gupte, op.cit., 100.

2. J.R. Gharpure, Sâpiṇḍya, p.1.

The term "Pinda" has been interpreted by the Mitâkṣhâra as meaning "blood particles", whereas under the Dâyabhâga it means exequial offerings and is determined by the capacity to offer Pindas.¹ However, the expression sapindaship prior to Vijnaneswara meant,² it appears, the relations by the funeral oblations and very likely referred to the agnatic relations in ascent or descent. Vijñāneśwara gave a wider meaning to the expression sapinda when he explained it citing Garbopaniṣad.³ Sapinda according to

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1. J.R. Gharpure, Sâpinḍya, 1 and 66.
 2. Ibid., p.1. See Mayne, Hindu Law and usage (11th Edn.) p.145. See also ibid., p.2; Apas. 2,4,15-16; (on marriage) sagotrâya duhitaram prayacchet/ mātusca yoni-sambandhebhy-
ay/- Apas. 2,6,16,2 (on impurity). But see Apas. 2,6,14,2; putrabhave yaḥ pratyāsannaḥ sapinḍaḥ; Baudh. 1,1,1-3. (where the term is used only for agnates). Vasistha 4, 10-19 (for agnates on inheritance). In Arthasastra 3,4,40; 3,6,22, sapinda is clearly a near agnate. However, Manu III, 5, uses the term for relations on the mother's side also.
 3. J.R. Gharpure: Sâpinḍya p.7.

"This body consists of six sheaths, three are from the father and three from the mother. The bones, the nerves, and the marrow are from the father; the skin, the flesh, and the blood are from the mother."

Similarly beginning from the father and counting his father and onwards to the ancestor in the seventh degree is understood to be the "seventh from the father."

In the same manner "in the case of two sisters, or a sister and a brother, or a brother's daughter and father's brother, in regard to marriage, the two being the first, from them the difference in branches is counted."

Vijnaneswara, is one who has the same pinda (i.e., blood particles) and implies a connection between the persons to whom it is applied with one body either immediately or by descent,¹ i.e., the son stands in sapinda relation to his father because of particles of his father's body having entered his. Similarly, sapinda relationship arises between, grandson and paternal grandfather and the rest, son and mother, grandson and his maternal grandfather and the rest, nephew and maternal aunts and uncles, and the rest, nephew and paternal uncles and aunts. The wife and husband also are sapinda relations to each other, "because", as Professor

1. J.R. Gharpure, Sapindya pp.6-7. The passage runs as follows:

"A-sapindâ, not a Sapindâ; Samânah 'common' i.e. one pinda body of whom, that (one) is Sapindâ; not a Sapindâ is an a-sapindâ; such a one (he should marry).

Sapinda relationship arises (between two people) through (their) being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of the particles of the father's body, having entered (his). In like manner (stands) the grandson in sapinda relationship to his paternal grandfather and the rest, because through his father, particles of his (grand-father) body have entered into (his own). Just so is the son (a sapinda relation) of his mother, because particles of the mother's body have entered in his own. Likewise the grandson (stands in sapinda relationship), to his maternal grandfather and the rest, through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest because particles of the same body (the maternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with his paternal uncles and aunts and the rest.

continued:

Derrett¹ prefers to call it, "they together produce (or make) one body." In like manner, brother's wives also are sapindas of each other.

(b) Co determination of "sapinda" according to Mitakshara:

Vijnaneswara divides all sapindas into two categories, (1) Samanagotra or sagotra sapindas and (2) bhinnagotra sapinda or bandhus. The sagotra sapindas are within seven degrees of the common ancestor. The bhinnagotra sapindas are cognates within five degrees of the common ancestor.²

So also the wife and the husband (are sapinda relations to each other), because they together beget one body (the son). In like manner, brother's wives also are (sapinda relations to each other) because they produce one body (the son) with those (severally) who have sprung from one body i.e. because they bring forth the sons by their union with the offspring of one person, and thus their husband's father is the common bond which (connects them). Therefore, one ought to know that wherever the word Sapinda is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

1. J.D.M Derrett
2. Mitak on Yajn. I, 53. trans. by P.V.Kane, Hist. of DS. Vol.3(2) pp.453-5. "In this manner wherever the word sapinda occurs, there one has to understand connection with (or continuity of) particles of the same body either directly or mediately. On the word 'asapindām' it was explained that sapinda relationship arises immediately or mediately by reason of the connection with particles of the same body; this may prove to be too wide a statement, since in this beginningless saṁsāra, such a relationship might exist in some way or other between all men; therefore, (the sage Yājñavalkya) states 'after the fifth on the mother's side and after the 7th on the father's side'. After the fifth on the mother's side i.e.

continued:

① Kane gives the following rules for computing the degrees of sapinda relationship:

(1) In computing degrees the common ancestor is to be included; (2) regard is to be had to the father and mother of the bride and bridegroom both; (3) if computation is made from the mother's side of either the proposed bride or bridegroom, they must be beyond the fifth degree (i.e. they must be 6th or further on) from the common ancestor and if it is made through the father of either, they must be beyond the seventh from the common ancestor (i.e. they must be eighth &c.). This last postulates four different classes of cases, viz. descent from a common ancestor may be traced through the fathers of both bride and bridegroom or through the mother of both, or through the mother of the bridegroom and the father of the bride or through the father of the bridegroom and the mother of the bride.

in the mother's line and after the 7th on the father's side i.e. in the father's line sapinda relationship ceases. These words (viz. sapinda ... ceases) are to be taken as understood (in the text of Yāj.). Therefore the word 'sapinda' though it applies everywhere (i.e. to a very wide circle of persons) by the expressive (i.e. literal) power of its component parts, is restricted to a certain definite sphere, like the words 'nirmanthya' and 'pañkaja'. And so the six (ascendants) beginning with the father and the six descendants beginning with the son and the man himself as the seventh (in each case) are sapindas; wherever there is a divergence of the line, the counting shall be made until the seventh in descent is reached including him (i.e. the ancestor) from whom the line diverges; in this way the computation is to be made everywhere. And so the fifth (if a girl), who stands in the fifth generation when a computation is made beginning with the mother and going up to her (mother's) father, mother's paternal grandfather &c., is styled in an indirect way 'fifth from seventh from the mother's side (by Yajñ). In the same way 'the seventh from the father's side (in Yajñ) is she who is seventh in degree (from an ancestor) when computation is made beginning from the father and proceeding up to the father's father and so on."

1/ Kane, Hist of D.S. Vol III (2) p 455

① Kane illustrates the application of the rules of sapinda relationship.

In all of them A represents the common ancestor and the letters S and D represent respectively sons and daughters. According to the Mit. computation has to be made from (and inclusive of) the common ancestor in all cases and both the bride and bridegroom have to be beyond the prohibited degrees.

No.1.

A

D(2)	D(2)
S(3)	S(3)
S(4)	S(4)
S(5)	D(5)
S(6)	S(6)
S(7)	S(7)
D(8)	S(8)

Here a valid marriage might take place between S(8) and D(8) because sapinda relationship for both is traced through their fathers and both are removed from the common ancestor A by more than seven degrees or generations.

No.2.

A

S()	S(2)
S(3)	S(3)
S(4)	S(4)
D(5)	D(5)
S(6)	D(6)

Here a valid marriage may take place between S(6) and D(6) because sapinda relationship of both is in this case traced through their mothers and they are both removed from the common ancestor by more than five degrees.

No. 3

A

S(2)	S(2)
S(3)	S(3)
S(4)	S(4)
D(5)	D(5)
S(6)	D(6)
D(7)	S(7)

No. 4

A

S(2)	S(2)
S(3)	S(3)
S(4)	S(4)
D(5)	S(5)
D(6)	S(6)

1. Kane, Hist. of DS. Vol.III (2) p.455.
 2. Kane, Hist. of DS. Vol.III (2) pp.456-58.

Here a marriage may take place between S(6) and D(6) because the sapinḍa relationship is to be traced through their mothers and both are removed from the common ancestors by more than five degrees. But a marriage cannot take place between S(7) and D(7) as the sapinḍa relationship of D(7) is to be traced through her father and she is not more than 7 degrees from the common ancestor.

Here a marriage cannot take place between D(6) and S(6) as the sapinḍa relationship in the latter's case is to be traced through his father and he is not more than seven degrees removed from the common ancestor, though D(6) whose sapinḍa relationship is to be traced through her mother is more than five degrees from the common ancestor. According to Bālaṁbhaṭṭa and some others marriage will take place as D(6) is beyond five degrees (tracing through her mother), though S(6) is within 7 degrees (tracing descent through his father) and so is not outside sapinḍa limits

All these four examples are taken from the Dharma-sindhu (III Pūrvārdha p.226-227). No. 3 illustrates what is called sapinḍa relationship by 'frog's leap'. Just as a frog leaps from one spot to another leaving intervening objects untouched, so in this example No.3, there is sāpinḍya between D(5) and D(5), but S(6) and D(6) are left unaffected by sāpinḍya (as relationship is traced through the mothers of both), while sāpinḍya reverts to affect D(7) and S(7). The maxim of 'frog's leap' is a very ancient one, being exemplified by the Mahābhāṣya of Patañjali.

(c) Determination of sapinda according to Dayabhaga:

The rules relating to prohibited degrees according to the Dayabhaga have been laid down by Raghunandana and are stated by Sir Gooroodas Banerjee:¹

Rule I. (a) The female descendants as far as the seventh degree, from the father and his six ancestors, namely, paternal grandfather, etc.,

(b) The female descendants as far as the fifth degree, from the maternal grandfather and his four ancestors, namely, the maternal great-grandfather, etc.,

(c) The female descendants as far as the seventh degree from the father's bandhus and their six ancestors, through whom those females are related and

(d) The female descendants as far as the fifth degree from the mother's bandhus and their four ancestors through whom those females are related, are not to be taken in marriage.

Rule II. The daughter and the daughter's daughter of a step-mother's brother are not to be taken in marriage.

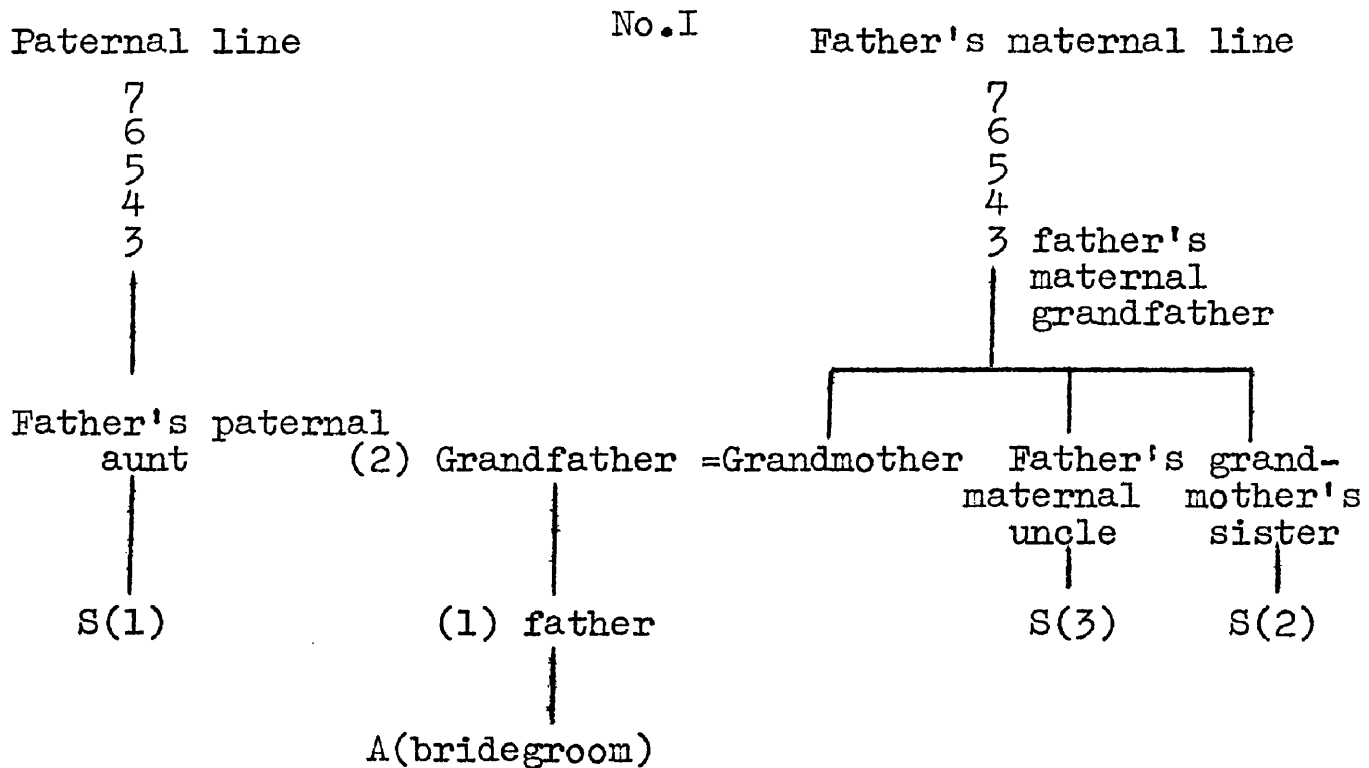
Exceptions: (1) A girl who is removed by three gotras from the bridegroom is not unmarriageable, though related within the seven or five degrees as above described (c¹).

(2) When a fit match is not otherwise procurable, the Kshatriyas in all the forms of marriage and the other classes in the Asura and other inferior forms of marriage, may marry within the above degrees provided they do not marry within the fifth degree on the father's side and the third degree on the mother's.

1. Marriage and Stridhana 5th Edn. p.167 citing Udhvāhata¹va, II, 65.

①

Kane illustrates these by the following diagrams:



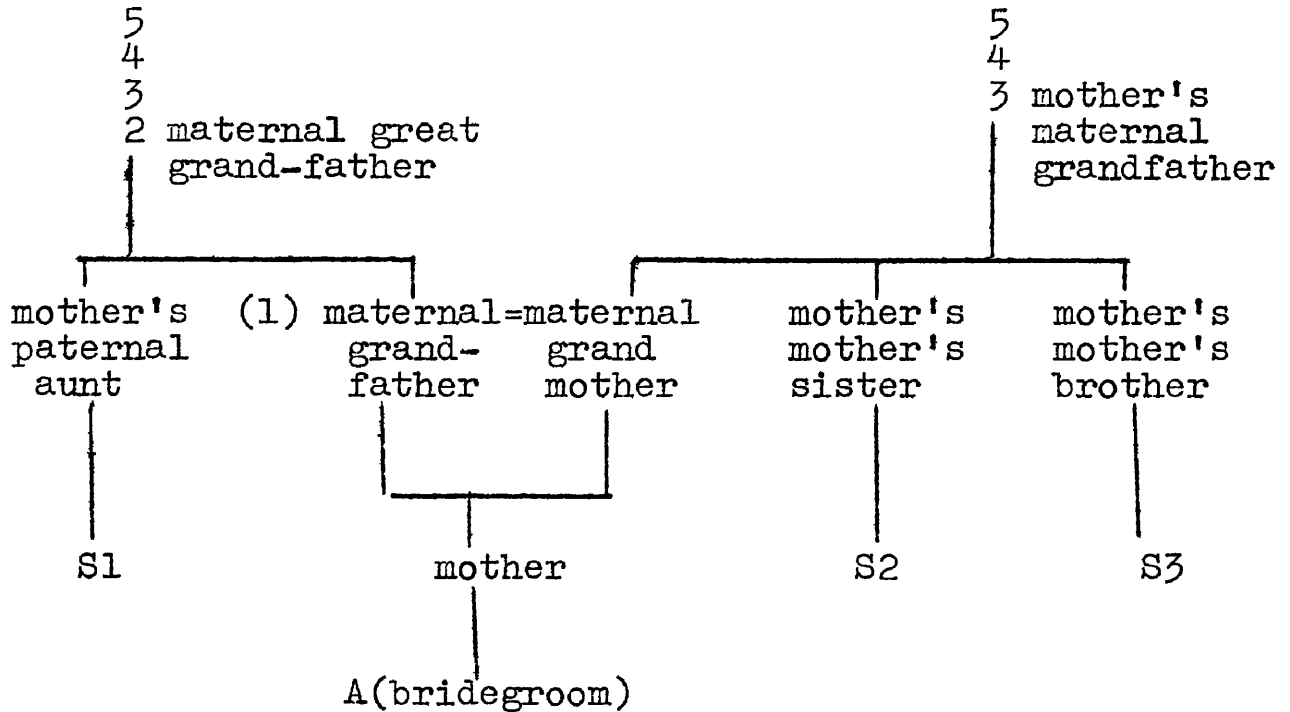
N.B. - Here S1, S2 and S3 are the three pitṛbandhus of A, the bridgroom, and they are the starting points for calculating prohibited degrees among paternal cognates. In the ascending line only the descendants of the common ancestors are excluded. For example, S1 is a pitṛbandhu and his descendants up to 7 degrees are excluded; but S1's father is not a bandhu of the bridgroom; therefore S1's father's sister may be married by the bridgroom. Under this rule the 6th descendant (a girl) of S1 will be ineligible for marriage with A: but she will be 9th from A's grandfather's father who is the common ancestor. So it will be seen that this goes far beyond the limits of sāpiṇḍya generally prescribed and there is no valid reason assigned for this.

1/ Kane, Hist. of D.S. vol. III (ii) pp 475-6.

No. II

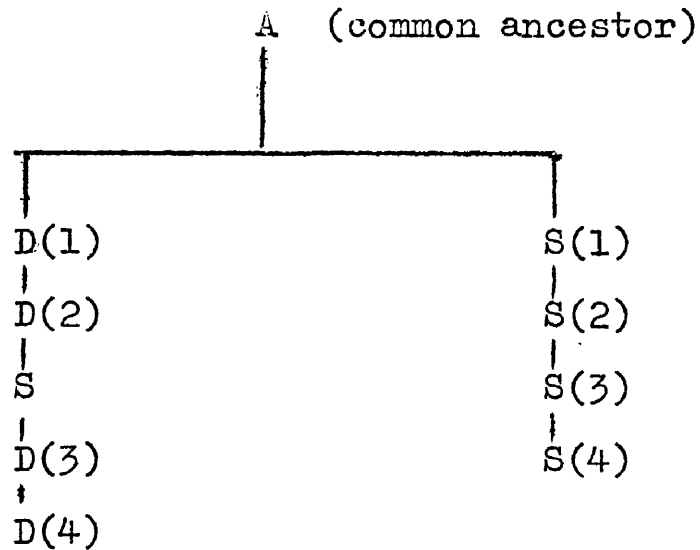
Mother's paternal line

Mother's maternal line



N.B. - Here S1, S2 and S3 are *mātrbandhus* of the bridegroom. The maternal great-grandfather is the starting point in calculating prohibited degrees in the mother's paternal line. In the mother's maternal line the starting points are S2 and S3. In the ascending lines of the *mātrbandhus* the descendants of only the common ancestor are excluded. For example, the girl descended from S3's maternal ancestors may be married by the bridegroom and so also a girl descended from the paternal ancestor of S2 or S1.

Another rule propounded by Raghunandana is that even within prohibited degrees a valid marriage may be contracted if three gotras intervene. In the case of girls descended from *pitṛbandhus* and *mātrbandhus* the computation of gotra must be made from them. For want of space it is not thought advisable to illustrate this by citing several examples. But one example is given to illustrate this rule.



Here according to the Bengal school S(4) can marry D(4) because three gotras intervene between her and the common ancestor, although S4 is only 5th in descent from the common ancestor; for according to the Bengal school it is not necessary that both the bridegroom and the bride be beyond the limits of sapinda \dot{a} ship, but only the bride need be so; while according to many writers of the Mitāk- \dot{a} śarā school both must be beyond the limits of sapinda \dot{a} ship from the common ancestor.

(2) Sapinda relationship under HMA:

The HMA, abolishing the distinction between the Mitakshara and the Dayabhoga school and adopting a uniform rule, defines a sapindā as, "two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of

them."¹ The HMA defines the limit of sapinda relationship as "Sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as first generation."²

(i) Lineal ascendant within the limits of sapindaship.

The male sapindas under this category, according to Mr. Gupte³, would be father, father's father, father's father's father, father's father's father's father, mother's father, father's mother's father, father's mother's father's father, father's father's mother's father, father's mother's mother's father, son, son's son, son's son's son, son's son's son's son, and daughter's son; and the female sapindas would be, mother, mother's mother, father's mother, father's father's mother, father's father's father's mother, father's mother's father's mother, father's mother's mother, daughter, daughter's daughter, son's daughter, son's son's daughter and son's son's son's daughter.

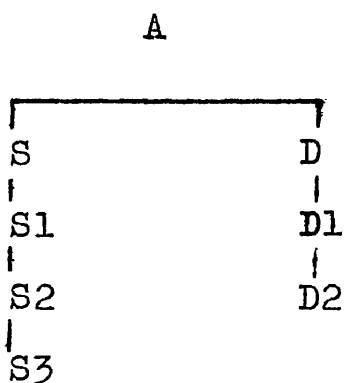
1. S.3(x)(ii)

2. S.3(x)(i)

3. S.V. Gupte, Hindu ^{Law of} Marriage Act, p.97.

(ii) Persons having common lineal ascendant within the sapinda relationship:

Two persons would be sapindas of each other if their common lineal ascendant is within the limits of sapinda relationship, i.e., within the fifth degree (inclusive) through his or her immediate male ascendant and within the third degree (inclusive) through his or her immediate female ascendant. Mr. Gupte¹ illustrates it in the following manner."In the diagram opposite ... S3 and D1 are not



lineal ascendants of each other but they can not marry because their common lineal ascendant 'A' is within the limits of the sapinda relationship. Thus D1 whose immediate ascendant is her mother D is within three degrees of A and similarly S3 whose immediate lineal

ascendant is his father S2 is within five degrees of A. But in this very diagram S3 can marry D2 because the latter is not within the sapinda-relationship, she being beyond three degrees of A. It may be pointed out that both under the Mitakshara and the Dayabhaga law, S3 and D2 could not marry each other as both are sapindas of each other and also within the prohibited degrees laid down by the schools."

1. S.V. Gupte, Hindu ^{Law of} Marriage Act, pp.97-8.

The table on the next page Mr. Gupte¹ shows the sapindas of both the categories mentioned above. If 'B' is the bridegroom he can not marry any person indicated by letter M or D who are his sapindas. If 'B' is the bride she can not marry any of the persons indicated by letters F and S who are her sapindas. He or she can marry any other person unless she or he is a lineal ascendant in addition to those mentioned in the table.

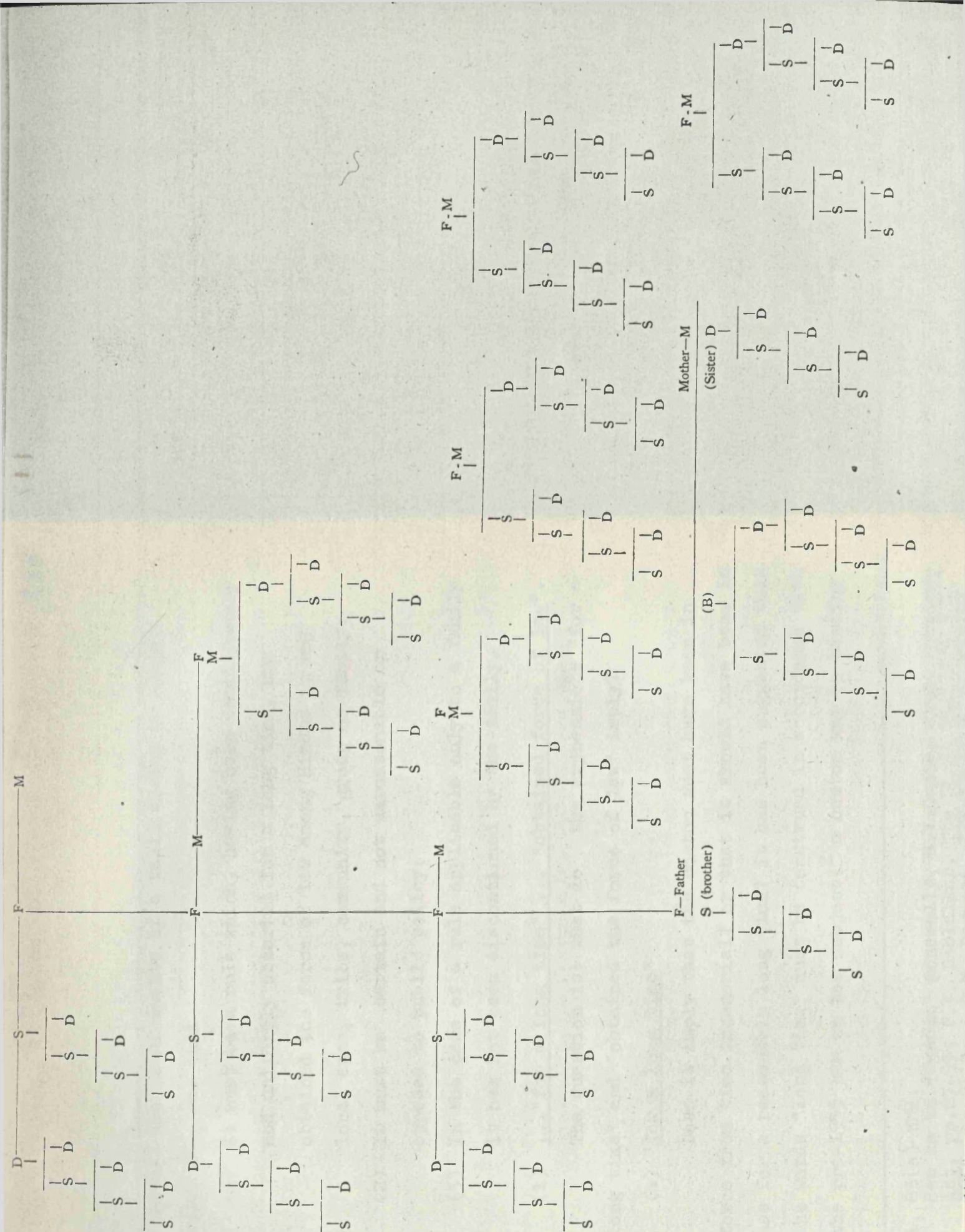
IV. Custom:

A custom or usage, if adequately proved, might render most of the rules relating to degrees of prohibited ~~degrees of~~ relationship or sapindaship inapplicable. In pre-1955 law a custom to be valid must be ancient, certain, reasonable, in consonance with public policy and morality.²

1. S.V. Gupte, Hindu Marriage Act, p.98A

2. See Mayne, Hindu Law and Usage (11th Edn.) pp.65-8; Gupte, Hindu Law in British India, p.20; Mulla, Principles of Hindu Law, p.90-3.

See P.V. Kane, Hist. of D.S., Vol.III(ii) p.876 ("... the requisites of valid customs, according to the smritis and commentaries and digest, are similar to those laid down by the writer on Purvamimanasa, i.e. that they must be ancient, must not be opposed to Shrutti and Smriti, must be such that they are regarded by respectable people as obligatory on them and as such are observed with that consciousness by the shistar, they must be strictly construed and cannot be availed of by others not within their purview and must not be immoral or severally condemned by popular sentiment.")



However, the requirements of a valid custom or usage, under HMA, are that

- (1) It must be a rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;
- (2) It must be certain and not unreasonable or opposed to public policy;
- (3) In the case of a rule applicable only to a family it has not been discontinued by the family.

- (1) ..."for a long time" ... "obtained force of law".

The question is: what do the expressions "for a long time" and "obtained the force of law" imply?

- (a) "for a long time"

Does it imply that the custom must have been in force from time immemorial? or that it should have been in use for a reasonably long time? It has been suggested that the words "long time" must be construed in accordance with the pre-1955 law on the subject:² a custom may be binding

1. S3(a) HMA.

See as to "Custom" generally, S.V.Gupte, Hindu Marriage Act, pp.87-93; P.V. Deolalkar, The Hindu Marriage Act, 1955, pp.21-4; J.D.M. Derrett, Introduction to Modern Hindu Law, pp.12-16 at pp.15-16; D.F. Mulla, The Principles of Hindu Law, pp. 90-3; Treatise on Hindu Law and Usage (11th Edn.) pp.59-72; Trevelyan, Hindu Law (3rd Edn.) pp.29-35; S.V. Gupte, Hindu Law in British India, pp.19-23.

2. J.D.M.Derrett, Introduction to Modern Hindu Law, p.15.

in point of antiquity if it extends as far back as memory suffices, so that a custom proved to have prevailed for last 40 years or so may well be 'ancient' or have been observed for 'a long time' for our purpose. It is submitted that "for a long time" may mean that the custom or usage should have been in use for a reasonably long time as distinct from "time immemorial".

The test which should be kept in view, in considering the meaning of "for a long time", may be found in the observations of Fazl Ali, J, following Mt Subhani V. Nawab¹ in Gokalchand V Parvinkumar,²

"A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a

1. A.I.R. 1941 P.C. 21 at 32.

2. A.I.R. 1952 S.C. 231 at 234 followed by Satyanarayana Ragu, J, in N.Venkata V T. Bhujangayya A.I.R. 1960 A.P. 412 at p.413-14. (discussed below).

particular custom."

Similarly, Madhav Rao V Raghavendra Rao¹ and N. Venkata V T. Bhujangayya² may be taken as illustrations explaining the meaning of "for a long time". In Madhav Rao V Raghavendra Rao, Gajendragadkar, J, observed that,³ "... it seems to be fairly well established that if in a particular case the party pleading a custom has produced general evidence of a respectable and reliable character showing that the particular custom prevails amongst the community to which the witnesses belong, and that the observance of the custom is well known for a fairly long period of time, that evidence can be accepted in support of the custom pleaded. The decisions also seem to lay down that if instances are cited covering a period of nearly 30 years, it would not be unreasonable to presume that the evidence of those instances shows that the custom had been in existence even before the period covered by those instances". In N. Venkata V T. Bhujangayya,⁴ where instances covering a period of nearly 40 years were presumed to establish the existence of the custom, Satyanarayana Raju observed that,⁵

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1. A.I.R. 1946 Bom. 377. See also authorities cited therein.
 2. A.I.R. 1960, A.P. 412.
 3. Madhava Rao V Raghvendra Rao A.I.R. 1946 Bom.377 at 388.
 4. A.I.R. 1960 A.P. 412.
 5. ibid at p.414.

"The plaintiff has produced evidence of a reliable character showing that the particular custom prevails among the community to which the witness belongs and the observance of the custom is well known for a fairly long period of time. The plaintiff's witnesses have given instances covering a period of nearly 40 years and it would not be unreasonable to presume that the evidence of those instances shows that the custom had been in existence even before the period covered by them..."

(b) "Obtained the force of law".

The term "Obtained" means "to acquire, to get, to prevail upon".¹ Thus the expression "Obtained the force of law" may imply a permissive custom or usage which has prevailed upon among Hindus, in any area, tribe, community, group, or even a family. It appears, however, that a few instances of custom or usage being so prevailed may be sufficient to enable the Court to hold that the custom has "Obtained the force of law".

The Privy Council in Ajai V Mt. Vijaikumari,² while dealing with the question of a custom excluding a daughter from inheritance in respect of an estate governed by male

1. Murray: A New English Dictionary, Vol.7(1) p.37.
2. A.I.R. 1939 P.C. 22.

primogeniture, emphasizes that in proving a custom it was not necessary to adduce proof of actual instances of custom taking effect. It was observed by their Lordships that,¹

"It is well established that proof of actual instances of such a custom taking effect is not necessary... The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion though generally in the nature of a family tradition, are clearly admissible. It was held, following Ajai V Mt. Vijai Kumari, in Madhava Rao V Raghavendraro,² ~~held~~ that In the case of permissive customs the test of invariability can not be rigidly applied; that the necessary proof in each case will depend on the nature of the custom alleged; and that the want of instances or paucity thereof does not prevent the Court from holding the custom; if there is a general consensus of opinion of persons who are likely to know of its existence, particularly when the evidence is all in one direction. Similar view was taken by Dixit, J, in Motiram V Sukma³ where it was held that, "... if the custom is permissive and not one obligatory or opposed to the ordinary law or modifying the ordinary law of succession, then there may be only few instances and perhaps none where

1. A.I.R. 1939 P.C. 22 at pp.24-5.
 2. A.I.R. 1940 Bombay 377 at
 3. A.I.R. 1960 M.P. 46 at 48.

the custom was followed. In the case of a permissible custom, the rule of invariability will not apply and a few instances may be sufficient to enable the Court to hold that the custom prevails in the community concerned.

The Court may, however, hold an alleged custom, which runs counter to the fundamental conceptions of Hindu law, not proved to be binding as if they were law. In Chidambaram V Suberamanian¹ three customs were pleaded to be binding as if they were law. It was alleged that according to the usual practice obtaining in the Nattukottai Chatti Community the manager is entitled to a decent remuneration for managing the joint family business and the properties; that it is customary for members of the family to make presents to sisters and that joint family properties, sufficient for that purpose might be set apart ...; that there is a practice for a member of the family to live separately after marriage and whatever he draws from the joint family is thereafter entered in a separate account called 'Pathuvazhi', which includes amounts drawn by the members for their maintenance.

Venkataraman, J, held alleged customs not proved to be binding on the ground that the customs relating to remuneration of the manager and "Pathuvazi" account were counter to the fundamental conceptions of the joint family.

1. A.I.R. 1953 Mad. 492.

(2) must be "certain", not "unreasonable", not opposed to public policy":

(a) must be "certain":

When it is said that, "a Custom is void because it is unreasonable", what is meant that a custom to be accepted as a valid custom must be definite and opposed to vague, for the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from a long time, must have resulted from accident or indulgence.¹ In proving that a custom is applicable as alleged the burden of proof lies on the one asserting it. It is his or her duty to say exactly what the custom is, and how it relates to the issue.² Professor Derrett³ provides us two examples on an uncertain custom, namely,

- (i) A vague assertion that females never inherit; and
- (ii) that a share is given to daughters, without proof of what proportion is in fact to be allowed.

Similarly, an alleged custom of total remission of rent by the tenants on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, was held to be uncertain.⁴

1. Shibnarain V. Bhutnath -[1917] I.L.R. 45 Cal.475 at 479.
 2. J.D.M.Derrett: Introduction to Modern Hindu Law, p.15.
 3. ibid. See also S.V. Gupte, Hindu Marriage Law, p.90.
 4. Shibnarain V. Bhutnath [1917] I.L.R. 45 Cal.475.

(b) "Not unreasonable":

A Custom to be valid must be reasonable. Now what is meant by reasonable? The test to be applied is whether the alleged Custom is repugnant to justice, equity and good conscience.¹ An alleged custom to pass over cultivable land² or a custom which would result in precluding the land forever from being brought under cultivation³ or a custom that one may take soil from another's land⁴ is certainly unreasonable. So also an alleged custom of total remission of rent on the ground that a certain portion of land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific.⁵ Similarly, a custom compelling the second husband to pay compensation, to the first husband's family in respect of the expenses of the first marriage would be void as amounting to restraint on a widow's marriage.⁶

(c) "opposed to public policy":

This will include, it appears, a custom which is immoral, or opposed to a statute or abhorrent to decency or morality.

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1. Mayne, (10th ed.) p.71.
 2. Venkadu V. Subbaramiah [1954] 2 M.L.J. (Andhra section)24.
 3. Saladur V. Oajaddin [1936] I.L.R. 63 Cal.851.
 4. J.D.M. Derrett, Introduction to Modern Hindu Law, p.15.
 5. Shibnarain V. Bhutnath [1917] I.L.R. 45 Cal.475.
 6. Premnath V. Jasoda AIR. 1955 Ajmer 7.

(i) immoral custom:

The question of immoral custom was considered in Chinna V. Tegarai,¹ where, in a suit by the deva dasis (dancing girls) claiming to have by custom a veto upon the introduction of the new dancing girls into the service of that temple, the Court (Innes and Kernan JJ.) dismissing the appeal held that, "Assuming ... that ... by the custom of this pagoda, they have the rights they claim, and that the custom, in some respects, fulfills the requisites of a valid custom, it is still apparent that the Court in making the declaration prayed for, would be recognising an immoral custom, a custom, that is, for an association of women to enjoy a monopoly of the gains of prostitution, a right, which on the score of morality alone, no Court could countenance."

The question is whether a custom allowing the re-marriage of a woman whose divorce had taken place without formality is an immoral custom? In Ujai V. Hathi² it was held that a custom which authorises a woman to contract a natra marriage without divorce, on payment of a certain sum to the caste to which she belongs, is an immoral custom, which should not be judicially recognised. Whereas, it

1. [1876] I.L.R. 1 Mad. 168 at 171.

2. [1870] 7 B.H.C.R. A.CJ. 133.

appears from Puyam V. Motiram¹ that such a custom may be valid. However, it has been suggested² that "a custom to allow the remarriage of a woman whose divorce has taken place without formality, the custom allowing informal divorces, would not necessarily be invalid for immorality."

(ii) Custom opposed to a statute:

The question of a custom, being void as opposed to a statute arose in Latchman V. Appalaswamy.³ In Latchman's case the custom alleged was that when a widow remarries, she forfeits her claim to the jewellery and other gifts given to her at the time of her marriage either by her husband or her relations. Sangeeva Row Naidu, J., declaring the alleged custom as being invalid on the ground that it is contrary to Section 5⁴ of the Hindu Widow's Remarriage Act, 1856, and Section 14⁵ of the Hindu Succession Act, 1956, observed that,⁶ "A custom which attempts to defeat or nullify a statute must be struck down as invalid without further examination, for the simple reason that the Legislature had determined the policy of the law and what law would govern

1. AIR 1956 Manipur 18.

2. J.D.M. Derrett, Introduction to Modern Hindu Law, p.16.

3. AIR 1955 An.P. 55.

4. S.5. -Safeguards and provides against the forfeiture of any such property.

5. S.14 - converts such movable property as her own absolute property.

6. ex p-57

the parties; and that legislative enactment shall prevail unless the enactment itself saves any prevailing custom to the contrary."

(iii) abhorant to decency or morality:

In G. Hanumaiah V. G. Mallayya,¹ for example, where the question was whether a man might lawfully adopt his daughter's daughter's son, it was observed that, "... the witnesses depose that in the particular community it was permissible to marry a daughter's daughter ... it is not necessary for us to decide whether the custom of marriage is made out and whether it should be duly recognised."

The question is whether such a custom, adequately proved, would be valid? We know that a marriage with a daughter of maternal uncle was allowed,² however, the proposition that a custom might validly be proved enabling a man to marry his granddaughter is going too far. In Ramangauda V. Shivaji³ marriage with a niece was considered by the Bombay High Court to be incestuous and was held to be against

1. AIR 1959 An.P. 177.

2. See Venkata V. Subhadra [1884] I.L.R. 7Mad. 548, 549 (regarding sister's daughter and maternal uncle's daughter); Venkatalinga V. Vijiathamma [1883] I.L.R. 6 Mad. 43, 48 (marriage among Sudras between a paternal uncle and his niece was considered unwarranted, even though instances of such marriages were present).

3. cited in Mayne 10th edn. p.169.

policy, and invalid. Similarly, the Madras High Court in Balusami V. Balakrishna,¹ a custom permitting a marriage with the granddaughter was proved, however, it was held that such a custom is void being contrary to public policy. In view of the decision in Balusami's case, it is submitted that, Hanumaiah's case must be considered as incorrectly decided. The reason for this is provided by Professor Derrett² in the following terms, "The effect of this judicial viewpoint has been to unsettle customary rules in so far as these are not evidently mandatory (and of course in so far as they are still not abrogated by the statutes), and greatly to influence their interpretation in a manner favourable to consistency with the existing personal law, even if the rights at issue were created or allegedly created long before the 'Code' was enacted ... There cannot be any doubt but that Parliament reprobated such matches (i.e. marriage with daughter's daughter). Thus where any issue depends upon the validity of an alleged marriage between a man and his granddaughter there should be no doubt but that the alleged marriage was void, no matter when contracted."

Rambhabai V. Kanji³ is another example of a

1. AIR 1957 Mad.97.

2. J.D.M.Derrett, "Recent Decisions And Some Queries in Hindu Law", (1960) Bom. L.R. p. 17 ff. at p.18.

3. AIR 1953 Sau.88.

custom being void as opposed to public policy. In Rambhabai's case in a community where divorce is permitted by consent, an ante-nuptial agreement whereby a husband agrees to grant divorce to his wife on the happening of certain events was held to be void on the ground that public policy requires that the parties should not contemplate separation or divorce before or at the time of entering into marriage.

(3) "Discontinued"

In the case of a family custom, to be valid, it is necessary that it shall not have been discontinued. This discontinuance can not, however, be proved by non-user of a custom by a caste or sub-caste, unless the Court had declared it ~~absolute~~ ^{obsolescent}.¹ However, in case of a family custom discontinuance may be proved by intentional or merely accidental non-user of the custom by the family.² This discontinuance could be proved by conduct~~d~~ and not necessarily from an overt agreement.³

(4) Proof of Custom:

The HMA does not provide rules as to the proof of custom. However, a custom should be proved by clear and unambiguous evidence. It is not essential to prove a custom

1. J.D.M. Derrett, Introduction to Modern Hindu Law, p.16.
 2. S.V. Gupte, Hindu Law of Marriage, p.91.
 3. J.D.M. Derrett, Introduction to Modern Hindu Law, p.16.

from actual instances¹ and is not a matter of inference.² It was held in Madhavarao V. Raghavendra Rao³ that what is necessary to be proved is that the usage has been accepted in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to an established governing rule of the particular family or district. The general opinion of members of the community or elders, who are likely to know the existence of the custom is entitled to great weight.⁴ Similarly, general evidence, as for example proof of conduct by members of the caste which could be explained upon the basis of the custom will often suffice.⁵

V. Degrees of prohibited relationship and sapinda relationship in Kenya and Uganda:

There is no specific mention of sapinda relationship. However, a person within the prohibited degrees of consanguinity if - one is a lineal ancestor of the other,⁶ or one was the wife or husband of a lineal ancestor or descendant

1. See Madhavarao V. Raghavendra Rao A.I.R. 1946 Bom.380.

2. Jitendra V. Bhagwat A.I.R. 1956 Patna 457.

3. A.I.R. 1946 Bom. 380.

4. *ibid.*

5. J.D.M.Derrett, Introduction to Modern Hindu Law, pp.14-15. Cases cited therein.

6. Cap.157. S.3(2)(a) [Kenya] Hindu Marriage and Divorce Ordinance, 1960, S.3(2)(a) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.

of the other,¹ or one was the wife of the father's or mother's brother or of the grandfather's or grandmother's brother of the other,² or one was the husband of the father's or mother's sister or of the grandfather's or grandmother's sister of the other,³ or one is the brother or the sister of the other, or one is the uncle and niece of the other, or one is children of brother of brother and sister and sister or of brothers and sisters of the other.⁴ Lastly a person also within the prohibited degrees of consanguinity if, one has a common ancestor not more than two generations distant (if ancestry is traced through the mother of the descendant) or four generations distant (if ancestry is traced through the father of the descendant).⁵

In Kenya and Uganda Ordinance, like HMA, a marriage between persons within the prohibited degrees of consanguinity is possible if the custom governing each of them permits of a marriage between them.⁶ Similarly, the term "relationship" includes relationship through half blood, uterine blood, as well as by adoption.⁷

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1. Cap.157. S.3(2)(b) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.3(2)(b) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.
 2. Cap.157. S.3(2)(c) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.3(2)(c) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.
 3. Cap.157. S.3(2)(d) The [Kenya] Hindu Marriage and Divorce Ordinance 1960; S.3(2)(d) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.
 4. Cap.157.S.3(2)(e) The [Kenya] Hindu Marriage and Divorce Ordinance 1960; S.3(2)(e) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.
 5. Cap.157. S. (3)(2)F. The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.3(2)(F) [The Uganda Hindu Marriage and Divorce Ordinance, 1961.
 6. Cap.157 S.3(1)(e) The Kenya Hindu Marriage and Divorce Ordinance, 1960. S.3(3) [The Uganda] Hindu Marriage and Divorce Ordinance, 1960.

CHAPTER IVIMPOTENCEI. Introduction

A marriage may be annulled, under HMA, on the ground of impotence where the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceedings.¹ In the parallel provisions of the Kenya² and Uganda³ law it is provided, respectively, that, "... either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage", and "the respondent was permanently impotent at the time of the marriage."

The provisions of HMA seem to have been based on section 19(1) of the Indian Divorce Act, 1869 which provides as a ground that the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

1. S. 12(1)(a).

2. Cap. 157 S. 11(1)(b)(i) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960.

3. Cap. 112 S.13(1)(a) (The Law of the Uganda Protectorate) Vol.III, p.1547.

Distinction between "wilful refusal to consummate"
and "incapable to consummate"

A careful distinction must be made at the outset between the nullity of a marriage on the ground of wilful refusal to consummate the marriage and nullity of a marriage on the ground of impotence or incapability of consummating the marriage. It is submitted that "wilful refusal to consummate", i.e., a refusal which does not arise from incapacity whether physical or psychological, is something that supervenes the marriage whereas "impotence" or "inability" must be present at the time of the marriage and continued to be so until the institution of the proceedings. It has been observed that, "wilful refusal to consummate as distinct from inability (whether due to physical or mental causes) to consummate, is not a ground for nullity in India."¹ This observation, it is submitted, is equally applicable to cases of nullity under the Kenya and Uganda Ordinances. The reason for this may well be found in the report of the Royal Commission on Marriage and Divorce.² The Royal Commission recommending that "... wilful refusal should be made a ground for divorce, and not of nullity,

1. J.D.M. Derrett: Introduction to Modern Hindu Law, p.189.

2. Presented to Parliament [1956] Cmd. 9678. para.88, p.31.

in both England and Scotland";¹ gave the reason for its recommendation as,² "Refusal to consummate marriage may be evidence of impotence in the psychological sense, as for instance, some invincible aversion or repugnance which makes consummation impracticable. Such incapacity presumed to exist at the time of the marriage is a non-statutory ground of nullity both in England and Scotland. Wilful refusal, on the other hand, cannotes capacity to consummate the marriage but unwillingness to do so. To make this a statutory ground of nullity suggests some confusion of thought. Nullity should be granted for some defect or incapacity existing at the date of the marriage. Wilful refusal is something that happens after the marriage."

II Meaning of "impotence"

The expressions "impotent" and "impotence" are not defined either in HMA or by the Kenya or Uganda ordinances. "Impotent" and "impotence" means simply, respectively, in dictionary terms as, "wanting in sexual power"³ and "want of sexual power"⁴ "physical inability of a man or woman to perform the act of sexual intercourse."⁵ A precise judicial

1. Presented to Parliament [1956] Cmd. 9678. para.89, p.31 and para. 283 at p.83.

2. *ibid.*, para.89, p.31.

3. Murray: The Shorter Oxford English Dictionary, p.969.

4. *ibid.*

5. Earl Jowitt: The Dictionary of English Law, p.942.

definition of impotence is difficult to provide. The earlier definitions or attempted definitions of impotence are, however, ambiguous in nature.

In 1731, the Ecclesiastical Court in Catherina Elizabetha V Welde,¹ considering the question: whether the defendant is so incapable that he never can consummate, observed that, "it is necessary that the man should have a visible incapacity in order to annul a marriage before a triennial cohabitation."² In 1845 we find Dr. Lushington³ saying, as to the meaning of "impotence", that "if there be a reasonable probability that the lady can be made capable of a vera copula [true union] of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If on the contrary, she is not and can not be made capable of more than an incipient imperfect, and unnatural coitus, I would pronounce the marriage void." G - V G -⁴ was the first case enunciating the principle that the practical impossibility of consummation is the true test of impotence. Lord Penzance⁵ stated

1. [1771] 2 Lee 580 at 586 = 161ER 447 at p.449.

2. Now obsolete.

3. D - E V A - G [1845] 1 Ro**le**, ECC. 280 at 299 = 163 ER 1039 at p.1045.

See also J. Jackson: The Formation and Annulment of Marriage, p. 209.

4. [1871] L.R P and D Vol.II, p.287.

5. ibid., at p.291. See also J. Jackson: The Formation and Annulment of Marriage, p.211.

the proposition as follows:

"... the basis of the interference of the court [in cases of impotence] is not the structural defect, but the impossibility of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the court arises. The impossibility must be practical. It can not be necessary to shew that the woman is so formed that connection is physically impossible if it can be shewn that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect can not be sufficient to render a marriage valid if it be shewn that connection is practically impossible, or even if it be shewn that it is only practicable after a remedy has been applied which the husband can not enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to."

In G V G¹ Lord Dunedin approving the above observations of Lord Penzance observed that,² "... a person is in law impotent who is incapax copulandi, apart from the question of whether he or she is incapax procreandi." Similarly, in H V H³ (CA) and S V S⁴ the Court applied and

1. (H L) [1924] A.C.- 349.

2. [1924] A.C. 349 at p.353. See also J. Jackson: The Formation and Annulment of Marriage, p.210.

3. (March 31, 1954) unreported cited in S V S [1954].

³ All ER 736 at p. 741.

4. [1954] 3 All ER 736.

followed the test laid down in G - V G -.¹ Singleton,² L.J, and Karminski,³ J, respectively stated the proposition as follows:

"That shows the necessity of proving ... that the disability alleged is incurable or such as to make consummation practically impossible."

and

"The true test of incapacity is the practical impossibility of consummation."

The exact significance of the definitions laid down at English law and shared by Indian law is material. In Indian cases the judges have applied and followed the definition laid down in English law.

In Edward Charles Dawson V Matty Dawson,⁴ a case under section 19(1) of the Indian Divorce Act 1869, the Madras High Court defined impotence as, "... physical unfitness for consummation...". Similarly in Kanthy Balavendron V S. Harry,⁵ the court following English cases,⁶ understood impotence as meaning as "incapacity to consummate the marriage, that is to say incapacity to have sexual intercourse...".

1. [1871] L R P and D Vol.II, p.287.

2. [1954] 3 All E.R 736 at 741.

3. H V H unreported cited in S V S [1954]3 All.E.R.736 at 741.

4. AIR 1916 Mad. 675 at p.676.

5. AIR 1954 Mad. 316 at p.317.

6. D = E V A - G [1845], Rob ECC 280 = 163 E R. 1039;
G V G [1871] LR.PD. Vol.II, p.287.

Cases under H M A define impotence in the following terms. M V S¹ following S V S² and Jagdish Kumar V Sita Devi.³ following Lord Dunedin's observations in G V G,⁴ define impotence, respectively as, "The true test of incapacity is the practical impossibility of consummation" and, "Incapacity for sexual intercourse is an essential ingredient of impotency. Such an inability may arise from a variety of causes including the mental and moral disability." Whereas in Gudivada V Smt. Gudivada,⁵ Chandra Reddy, C.J., following T. Rangaswami V T. Arvindammal⁶ observed, as to the meaning of impotence, "the marriage would be avoided or dissolved on the ground of impotence if it is established that at the time of the marriage either of the spouses was incapable of effecting the consummation either due to structural defect in the organs of generation rendering complete sexual intercourse impracticable or due to some other cause." In T. Rangaswami V T. Arvindammal,⁷ Ramaswami, J.,⁸ explained in detail the meaning of impotence as follows, "... if ... at the time of the marriage one of

1. [1963] Ker. L.T. 315.

2. [1954] 3 All.E.R. 736.

3. A.I.R. 1963 PU. 114.

4. ~~[1871] L.R. PD vol. II, 741.~~ [1924] A.C. 549 (H.L.)

5. A.I.R. 1962 A.P. 151.

6. A.I.R. 1957 Mad. 243.

7. *ibid.*

8. *ibid* at p.248.

the parties is and continues to be incapable of effecting or permitting its consummation either of some structural defect in the organs of generation which is incurable and render complete sexual intercourse impracticable or of some incurable mental or moral disability resulting in the man inability to consummate the marriage with the particular woman or in the woman to an invincible repugnance to the act of consummation with the particular man."

We find that although impotence has been described, or explained in a variety of ways, we know, however, these do not represent a precise definition of impotence.

Thus impotence may be defined as a practical disability for sexual intercourse due to some malformation and/or invincible repugnance to the act of sexual intercourse generally or quod hanc (towards a particular ^{woman} ~~man~~) or hunc (towards a particular ~~woman~~) due to nervous and/or psychic disorder either proved as a fact or inferred from the conduct of the alleged impotent spouse.

The question is: what is meant by sexual intercourse and how it is to be defined? Doubts have arisen whether sexual intercourse with the use of contraceptives or contraceptive measures or where the husband had invariably adopted the practice of coitus interruptus (withdrawal

before emission) is complete intercourse? Similarly, whether conception or birth of a child is evidence of consummation or "intercourse in law".¹

(1) Meaning of intercourse:

Dr. Lushington² defined sexual intercourse as, "... ordinary and complete intercourse". What, then, was "sexual intercourse" in ecclesiastical law? The term used was "vera copula"³ (e.g. "... a person is in law impotent who is incapax copulandi...")⁴ "Copula" in the dictionary⁵ terms means simply "sexual union". Thus the meaning of vera copula must be sought elsewhere. Common understanding would seem not to be sufficient for this purpose. The reason is not hard to find. Whereas commonly intercourse is not complete without orgasm on both sides, the possibility of orgasm in one spouse negatives his or her petition for nullity on this ground whether or not there is possibility of orgasm in the other. It is not practical to distinguish possibility of orgasm from the male's erection and penetration, hence the law looks to erection and penetration and

1. J. Jackson: The Formation and Annulment of Marriage, p.210.

2. D-e V A-G [1845] 1 Rob. ECC. 280 at 298 = 163ER 1039 at 104.

3. See G V G [1924] A C 346 at 365.

4. *ibid* at 299 = 1045.

5. Murray: A New English Dictionary, vol.2, p.977.

not to orgasm (which in the case of male includes ejaculation whether or not, by operation or otherwise, the ejaculation of live sperm as such is reduced permanently or temporarily impossible).

"Vera copula" according to D - e V A - G¹ and White V White² means, respectively, "Coitus" and "Conjunction of bodies" and a true conjunction is achieved"³ ... as soon as full entry and penetration has been achieved." In R V R⁴ it was pointed out that "Vera Copula consists of erectio and intromissio". It was further pointed out that, "... "connection" or the "conjunction of bodies" or "erectio or intromissio" is ... equivalent to consummation in the ecclesiastical sense interpreted in the light of modern authorities."⁵ Thus it is submitted that sexual intercourse is, for our purposes, erectio and intromissio without necessarily ejaculatio.

(2) Use of contraceptives:

The use of contraceptives against the wishes of

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1. D - e V A - G [1845] 1 Rob. ECC. 280 at 298 = 163ER 1039 at 1045.
 2. [1948] 2 All. E.R. 151 at 155.
 3. *ibid.*
 4. [1952] 1 All. E.R. 1194 at 1198.
 5. *ibid.*

the other spouse might give rise to serious legal problems in India resulting in a nullity petition on the ground that the respondent is unable to perform proper sexual intercourse (as to the meaning of sexual intercourse, see above).

The first case on the question was Cowen V Cowen¹ where the wife petitioned for a decree of nullity on the ground that the husband refused to have intercourse without the use of contraceptives. This was accepted by Du Parcqu,² L.J. who granting the decree, following Dr. Lushington's observations in D - e V A - G,³ decided that sexual intercourse could not be regarded as complete when its natural termination was artificially prevented.

Cowen V Cowen⁴ was expressly overruled in Baxter V Baxter⁵ (H.L.) where opportunity thus arose to settle the

1. [1945] 2 All.E.R. 197;

As to comments on the subject see: R.M. Willes Chitty "Marriage-Nullity- wilful refusal to consummate - use of contraceptives." [1948] 26. Can. B.R. 576-581.

2. Cowen V Cowen op.cit. at p.199.

3. Op.cit. "Sexual intercourse, in the proper meaning of the term is ordinary and complete intercourse ... it does not mean partial and imperfect intercourse."

4. [1945] 2 All. E.R. 197.

5. [1947] 2 All. E.R. 886. (The Court of Appeal [1947] 1 All E.R. 387, held in Baxter V Baxter that the husband had disentitled himself to relief on the ground that by continuing intercourse with the use of contraceptives the husband had acquiesced in the wife's refusal to consummate the marriage, as consummation had been defined in the earlier cases. The House of Lords affirmed the refusal of the decree on other grounds.

law. In this case the husband asked for a decree of nullity on the ground of wife's refusal to permit intercourse without the use of contraceptives. It was held by their Lordships that the use of contraceptives did not prevent the consummation of the marriage. Lord Jowitt, L.C., observed, as to the use of contraceptives, that,¹"... the use of a sheath is by no means the only method of contraception in common use ... the use of the corresponding device of a mechanical pessary was at one point of the argument said to be indistinguishable from the use of a sheath, but at another point was likened to the employment of a douche, which, it was said, would not negative consummation because both were intended to operate after the sexual act was completed, so, it was suggested, was the pessary in the form of a spermatozool drug inserted before, but operating after, the sexual act ... it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on what is popularly called birth control, and, it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation [THE M C A 1937] Parliament used the word "Consume" as that word is understood in common parlance and in the light of social conditions known to exist..."

1. [1947] 2 All. E.R. 886 at p.

It is submitted that Baxter V Baxter¹ appears to have decided that while the use of contraceptives may prevent conception it neither prevents consummation of the marriage nor renders sexual intercourse imperfect. It is further submitted that obviously Baxter V Baxter² will be followed by the Indian courts because at a time where over population is the greatest problem it will be against the public policy to take the view that use of contraceptives renders sexual intercourse imperfect.

(3) Coitus interruptus:

Similarly it may be alleged that the practice of Coitus interruptus, renders the sexual intercourse imperfect and consequently the husband may be sued for nullity on the ground of impotence.

There is a conflict of authority on the question and the question was specifically left open by the House of Lords in Baxter V Baxter³ where Lord Jowitt L.C. emphasized that he was expressing no view on that practice when he observed,

1. [1947] 2 All. E.R. 886.

2. *ibid.*

3. *ibid.*

"...¹ this practice [i.e. coitus interruptus] as distinct from artificial methods of contraception, does not arise in the case before the House and I prefer to express no opinion about it." The first case on the question is Grimes V Grimes² where, on behalf of the wife it was argued that,

"...³ if the practice adopted is that of Coitus interruptus, there is no proper intercourse and, therefore, no consummation of the marriage ... for a marriage to be consummated there must be normal and full intercourse."

Finnemore, J, accepted this argument and granting a decree of nullity observed that,

"...⁴The point here is whether Coitus interruptus is a natural and complete intercourse. All the authorities that have been cited to me, going back to a long time, plainly suggest that it is not, because, for there to be natural and complete intercourse, there must be emission within the body of the wife..." i.e. the learned judge considered "ejaculation" as of the essence of the sexual intercourse. However, it is interesting to note that in

1. [1947] 2 All. E.R. p.889.

2. [1948] 2 All. E.R. 147.

3. *ibid* at p.148.

4. *ibid* at p.150.

Rice V Ragnold-Spring-Rice¹ a case decided shortly after the decision in Baxter V Baxter,² the Divisional Court came to the conclusion that coitus interruptus, practised by one party against the will of the other, was a good ground for the other spouse to separate from the offending party, i.e., was such as to constitute a good defence to a claim based on desertion.

The cases adopting the opposite view are White V White³ and Cackett V Cackett⁴ which appear to take the view that although sexual intercourse consists of erectio and intromissio, however, it does not necessarily include ejaculatio, i.e., it does not include, in the words of Finnemore, J.,⁵ "emission within the body of the wife". It will be noticed in passing that whether or not ejaculation could lead to conception proof of ejaculation is for practical purposes proof of the possibility of orgasm on the part of the woman, so as to deprive her of a ground for nullity for impotence on the part of her husband. Willmer, J., in White V White,⁶ observed that,

"...⁷ it is contended that there is a complete

1. [1948] 1 All. E.R. 188.

2. [1947] 2 All. E.R. 886.

3. [1948] 2 All. E.R. 151.

4. [1950] 1 All. E.R. 677.

5. Grimes V Grimes [1948] 2 All. E.R. 886.

6. [1948] 2 All. E.R. 151.

7. *ibid* at p.155.

conjunction of bodies - a vera copula - which means literally "true conjunction" - as soon as full entry and penetration is achieved. What follows goes merely to the likelihood or otherwise of conception. In my judgment, the latter contention must be correct". Similarly, in Cackett V Cackett¹ Hodson, J, following White V White² rather than Grimes V Grimes,³ was of the opinion that,

"the Court would be driven into an impossible position if it tried further to define what amounted to normal sexual intercourse ... for where a woman alleged that the man had failed to complete the sexual act, the Court would have to inquire exactly at what stage emission took place ... Here seed was emitted from the man in close proximity to the woman and the woman might have conceived ...".

It is submitted that, as we have seen, since sexual intercourse consists merely of erectio and intromissio without ejaculatio Coitus interruptus, following Cackett V Cackett and White V White, must be treated merely as a contraceptive measure and the practice of it from the commencement of the marriage cannot be claimed to be failure

1. [1950] 1 All. E.R. 188.

2. [1948] 2 All. E.R. 151.

3. [1948] 2 All. E.R. 147.

to consummate by natural intercourse.

(4) Conception or birth of a child:

The conception or birth of a child does not in itself establish that the marriage has been consummated, (i.e., ordinary and complete intercourse has taken place) for such conception or birth may be by fecundatio ab extra, or by artificial insemination.

(a) Fecundatio ab extra

In Snowman V Snowman,¹ for example, where the husband was incapable of ordinary and complete intercourse and the wife became pregnant by fecundatio ab extra Bateson, J., (followed D V A² and Russell V Russell³) granting a decree of nullity on the ground of the incapacity to

1. [1943] P.186.

2. D - V A [1845] 1 Rob.Ecc. 280 = 163 E.R. 1039.

3. [1924] (HL) 1924 A C.687 a case of adultery where the question was whether a birth of a child fecundatio ab extra by an unknown man is adultery. Lord Dunedin came to the conclusion that it is not and observed, as to fecundatio ab extra (see p.722) "Fecundation ab extra is admittedly, by the medical testimony, as vouched by the learned judge in his summing up, a rare, but not impossible, occurrence; but its accomplishment will depend, not only or exclusively on the proximity of the organs, but on certain other potential qualities of the particular man."

consummate the marriage observed, as to fecundatio ab extra,

"...¹ semen might have encountered the Vagina of the woman and caused a possible pregnancy without penetration or ordinary intercourse as it is properly understood." Similarly in Clarke V Clarke² a decree of nullity was granted to the husband due to the wife's incapacity where the wife was suffering at all times from "frigidity" although the wife gave birth to a son, of whom, it was admitted, the husband was the father because on the facts and on the medical evidence Pilcher, J, arrived at the conclusion that the birth of the child was due to fecundation ab extra³ and thus the marriage had never been consummated.

(b) Artificial insemination

The leading case on the point is L V L.⁴ In that case the marriage was never consummated owing to the husband's psychological attitude in sexual matters. The wife was anxious to have a child and discussed artificial insemination with her husband. She was artificially inseminated from her husband, but she had no success. However, she

1. Snowman V Snowman [1943] P.186 at p.188.

2. [1943] 2 All. E.R. 540.

3. Clarke V Clarke *ibid* at p.543. See also J. Jackson: The Formation and Annulment of Marriage, p.210.

4. [1949] 1 All. E.R. 141.

continued her attempts to inseminate herself artificially from the husband. There were further ineffective attempts to consummate the marriage and the wife was urging the husband to undergo psychological treatment which he did. However, the treatment did not make the efforts to consummate any more effective than they had been in the past. The wife became pregnant by artificial insemination. Pearce, J, granting a decree of nullity to the wife because it appeared from the evidence that the wife's dominant motive in conceiving the child was the hope that the advent of a child might help her and her husband to have normal intercourse. The learned judge did "...¹ not regard the conception of the child, serious as it is ... to be approbation [as to approbation see below] of an abnormal marriage", i.e. it does not amount to "intercourse in law".

III. What Constitutes Impotence:

In order to substantiate the above definition, we shall now consider instances amounting and not amounting to impotence.

1. [1949] 1 All E.R. 145-146.

See also J. Jackson, The Formation and Annulment of Marriage, p.210.

(1) Structural malformation:

The structural malformation may consist, in case of females, in abnormally shaped or missing female organs (i.e., wife with no uterus and a vagina forming a cul-de-sac making complete coitus impossible)¹ whereas in case of a male it may consist of in unduly large² or small male organ. However, an allegation that the respondent did not attain puberty will not amount to structural malformation in itself.³ This malformation may either be curable or incurable (see next page as to effect of incurability.)

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1. See D-e V A-G [1845] 1 Rob. ECC. 279 (where the wife was with no uterus and vagina forming a cul-de-sac rendering complete coitus impossible) W H V H [1861] SW. Tr. 24 (where congenital malformation of the wife rendered consummation impossible.) B V B [1954] 2 All. E.R. 598 (where the wife was with no vagina and artificial vagina was created. See also Kanti Lal V Vinla, A.I.R. 1952 sav (where the respondent had no development of womanhood, her vagina was not developed and the uterus was in a rudimentary state. The marriage was not annulled. However, the Bombay High Court in A V B [1952] 54 Bom. L.R.725 came to a contrary conclusion, ~~where~~
 2. Kanthy Balvendram A.I.R. 1954 Mad. 316.
As to a detailed information about malformation see John Glaister, Medical Jurisprudence and Toxicology (11th Edn. 1962) chapter XII, pp.344-49; Taylor's Principles and Practice of Medical Jurisprudence Vol.II, (11th Edn. 1957) pp.2-7; see also T. Rangaswami V T. Arvindammal A.I.R. 1957 Madras, pp.243-245 and books cited therein.
 3. Dawson V Dawson A.I.R. 1916 Mad. 675.

Curability:

A decree of nullity must be refused where the alleged structural malformation may be cured by medical operation and/or treatment without any danger to the spouse concerned, thus making consummation of the marriage a practical possibility. The Court, it is submitted, is obliged to accept a genuine¹ offer, at the trial, to undergo medical treatment and to adjourn the case for that purpose. However, the Court's former practice of adjourning a suit for further attempts when it deemed fit is obsolete.² It is self evident

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1. See M V M [1956] 3 All. E.R. (where the offer was not considered as a genuine one and Karminski, J, refused to grant an adjournment) S V S [1954] 3 All.E.R. 736 (where the hearing was adjourned to enable the wife to undergo the operation). The difference between two cases is that in S V S the wife alleged that she "is and was at all material times ready and willing to undergo the operation" whereas in M V M the wife knew about her condition and took no step and the offer of operation was an after-thought. See also Gaboli V Gaboli [1960] The Times, May 19th (where adjournment for an operation on wife thirteen years after the marriage was refused).
 2. See T V M [1865] L.R. 1 P and D 31; see also B V B [1958] 2 All.E.R. 76 (where the husband contended that a week was not long enough to determine whether the marriage could be consummated and it was held that "time must be considered as" factor in each case" (at p.78) and Barnard, J, observed that (at p.78) "I have come to the conclusion, on the evidence put before me, that no amount of time would help this marriage to be consummated. The husband had ample time during the seven days of the honeymoon to consummate the marriage and he was unable to do it, and I do not think that it would help the matter if he were given any further time."

that if even after the medical treatment the defect is not cured the marriage would be annulled.¹

In D-e V A-G,² for example, where there was evidence that an operation on the wife "could not be effected without endangering life, or running serious risk of doing so" Dr. Lushington found that she was practically incapable of consummating the marriage. Similarly, in W V H³ where the evidence showed a congenital malformation of the woman which was not absolutely irremovable a decree of nullity was granted because, "... any attempt to remove it would be attended by considerable danger to the life of the woman." S V S⁴ (1954) which was followed in M V S⁵ and S V S⁶ (CA)(no.2)(1962) are good illustrations in support of the proposition. In S V S (1954) the husband sought a decree of nullity alleging that the wife was at the time of the marriage and had ever since been incapable of consummating the marriage. The wife denying this alleged that she was not subject to physical or mental abnormality save a hymeneal stenosis with a thickened hymen removable by a

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1. See D V D [1954] 2 All.E.R. 598 (operation - artificial vagina was created - still no consummation - Marriage annulled) B V B [1955] P.42 (similar case).
 2. [1845] 1 Rob. ECC. 280 at 303 = 163 E.R. 1039 at p.1047.
 3. [1861] 2 SW. and Tr.241 at 245 = 164 E.R. p.987 at p.989.
 4. [1954] 3 All. E.R. 736.
 5. [1963] Ker. L.T. 315.
 6. [1962] 3 All.E.R. 55.

simple surgical operation which she "¹is and was at all material times ready and willing to undergo", and which she did. In S V S (1954)² Karminski, J, applying Lord Moncrieff's observations in WY V AY³ that, "If incapacity is only temporary and is subject to cure after appropriate treatment, then there is no reason for annulling a marriage" dismissed the husband's petition on the ground that,⁴ "... the wife is no longer incapable of consummation since the operation recently performed on her now has rendered her physically capable of consummation". Similarly in S V S⁵ (no.2)(CA) a decree of nullity was refused, where the wife had a malformed vagina, too short to permit full penetration, but according to the medical evidence capable of being enlarged by an operation with good chance of the operation being so successful as to allow full penetration. The Court held that the fact that full penetration could only be rendered possible either by surgery eradicating a malformation of the wife's vagina, or on the hypothesis that there was no natural vagina, by surgery creating an artificial vagina, would not prevent subsequent sexual acts amounting to

1. S V S [1954] 3 All. E.R. 736 at p.738.

2. ibid.

3. [1946] S.C. 27 at 31 (Scots case).

4. S V S [1954] 3 All.E.R. 736 at 738.

5. [1962] 3 All. E.R. 55.

consummation of the marriage, i.e., in the words of Willmer, L.J.,¹ "I do not see why intercourse by means of such [i.e. artificial] vagina should not be regarded as amounting to "Vera Copula", so as to satisfy the test laid down by Dr. Lushington".

S V S² is the nearest decision on facts to the Kerala Case of M V S³ which followed S V S. In M V S the wife's vagina had at the time of the marriage too narrow an opening to permit of easy intercourse. Perinetomy was performed after which normal intercourse became possible. The husband's expert witness found her now fit for normal intercourse. The husband did not attempt intercourse and pursued his petition for nullity on the ground that she was and remained impotent. The Court accepted the medical evidence, the malformation having been eradicated by operation. "The true test of incapacity is the practical impossibility of consummation".⁴ M V S was an even stronger case than S V S. In the former in any event, as so often in India the real object of the litigation was to extract money from the relatives of the other party.⁵

1. S V S [1962] 3 All. E.R. 55 at p.62.

2. [1954] 3 All. E.R. 736.

3. [1963] K.L.T. 315.

4. *ibid*

5. *ibid* at p. 315, 317. The husband's admissions in cross examination.

(2) Venereal disease:

The question is: whether venereal disease may be a ground for annulling a marriage on the ground of impotence? It is submitted that venereal disease by itself may not amount to /impotence. Only a venereal disease making normal intercourse impossible, as many syphilitical conditions do, may serve as a ground for nullity.

The proposition may be supported by Birendra Kumar Biswas V Hemlata Biswas,¹ where the petitioner asked that his marriage with the respondent may be declared null and void, on the ground that the respondent had been from before the marriage suffering from a loathsome disease of syphilitic origin alleged to be incurable and contagious in consequence whereof she is said to be unable to consummate the marriage. Mookerjee, A.C.J., remanding the case for further investigation observed that,²

"... It is the permanent or probably permanent character of the malady, rendering sexual intercourse impracticable throughout the continuance of the marriage, that furnishes the reason for annulment..." Greaves, J,³ annulling the marriage (following English cases) observed,

1. A.I.R. 1921 Cal. 459 (before remand).

2. *ibid* at p. 463.

3. A.I.R. 1921 Cal. 464 (after remand).

as to the effect of venereal disease, that,

"... upon the evidence, having regard to the state of the wife's health, I think consummation is a practical impossibility. I think the husband could not consummate the marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection and I think this state of things is likely to continue and be permanent and in my opinion this amounts to impotency on the part of the wife."

A contrary view has been taken in Wylie V Wylie² where Stuart, C.J., has observed that,

"...I, however, do not accept the view that the existence of a venereal disease in a woman constitutes impotence..."

It is submitted that although Stuart, C.J., was right in holding that venereal disease by itself is not impotence, however, his dictum should not be followed, unless qualified, in cases under the HMA because of the following reasons:-

(1) In Wylie V Wylie³ the question was not properly investigated. When Stuart, C.J., observed "There is no

1. A.I.R. 1921 Cal. 464. (after remand) at p. 466.

2. A.I.R. 1930 Oudh. 83 at p.84.

3. *ibid.*

authority in English law for the proposition that a woman, who is suffering from venereal disease, is considered to be impotent within the meaning of that word in English law" it is submitted his expression is too broad. In English law the position is that venereal disease may render sexual intercourse practically impossible; thus it could amount to impotence.

Similarly, the decision of Greaves, J, in Birendra Kumar's¹ case (after the remand) was not cited to the Court where the learned judge held that consummation of marriage under the circumstances (i.e. where the wife is suffering from an incurable venereal disease) is a practical impossibility and "... this amounts to impotency on the part of the wife, within the meaning of the decided cases"

(ii) The obiter dicta of Wazir Hasan, J,² that "... A question of law may arise which will have to be decided on a future occasion as to whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well founded apprehension of infection in case he has sexual intercourse with such a wife, in those circumstances the Court would be justified

1. A.I.R. 1921 Cal. 464.

2. A.I.R. 1930 Oudh. 83 at p.85.

to record a finding that the wife was impotent", (i.e. if the sexual intercourse is a practical impossibility) makes the authority of Stuart, C.J.'s decision unsatisfactory.

It is submitted, however, that mere danger to the other spouse's health and to that of any children who might be born of the marriage is the other party's affair. If the syphilitic spouse refuses to take a cure then questions of cruelty for the purposes of divorce arise.

(3) Sterility:

The question is: whether sterility can be the synonym of impotence? In T. Rangaswami V T. Arvindammal¹ where the power procreation and potency were not considered distinct when it was observed, (which was followed in Gudivada Venkateswararao V Smt. G. Nagamani)² "Potency in case of males means power of erection of the male organ plus 'discharge of healthy semen containing living spermatozoa' - "(which is not correct). In nullity suits based on impotence, it is submitted, the sterility (or the presence of "... living spermatozoa" is not relevant for power of procreation and potency are distinct. Sterility as distinct from impotency, in case of a male³ and female,⁴ means,

1. A.I.R. 1957 Mad. 243 at p.245.

2. A.I.R. 1962 A.P. 151 at p.152.

3. John Glaister, Medical Jurisprudence and Toxicology (11th Edn. 1962) p.344.

4. *ibid* at p.347.

respectively, "the inability to impregnate" and "incapacity to conceive". It is also submitted that sterility by a medical operation to avoid procreation of children should be considered on the same footing as use of contraceptives since it effects the same result which could have been effected by the use of contraceptives on each successive occasion.

The test had been laid down by Dr. Lushington in D-e V A-G¹ in the following terms,

"... The only question is, whether the lady [spouse] is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed". i.e. mere incapability of conception does not amount to impotence. The "true distinction" between sexual intercourse and sterility has been stated by Dr. Lushington² as follows,

"If there be a reasonable probability that the lady can be made capable of a vera copula - of the natural sort of coitus, though without power of conception - I cannot pronounce this marriage void...". This test was approved by

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1. [1845] 1 Robb. ECC. 280 at 296 = 163 E.R. 1039 at p.1044.
 2. ibid at 299 = at p.1045. In this a decree of nullity was refused merely because there was coitus. B - N V B - N (P.C.) [1854] 1.SP. ECC. and AD 248 = 164 E.R. 144 appears to support the view that proof that the wife is incapable of becoming a mother is not a sufficient ground for a nullity decree if she be otherwise apta viro.
See also J. Jackson: The Formation and Annulment of Marriage, p.209.

Lord Jowitt L.C. in Baxter V Baxter where it was observed that, "¹... counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary, it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant." Lord Jowitt disapproved J V J² [C.A.], a case of sterility artificially produced before marriage, where applying Cowen V Cowen³ it was held that the husband, by his act in having the operation performed, rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation i.e. sterility due to inability to perform the sexual act is just as much sterility as sterility due to some physical defect or a medical operation. It is submitted that this view is not correct and the reason, which may be followed in cases under HMA, may be found in Lord⁴ Jowitt's adoption of words from Lord Stair's⁵ Institutes, (of Law

1. [1947] 2 All.E.R. 886 at p.890.

2. [1947] 2 All.E.R. 43. There appears to be a printing mistake in Baxter V Baxter when Lord Jowitt says that (at p.891) "... nor was it cited to the Court of Appeal in J V J ... " we find citation of J V J as [1946] 2 All.E.R. 760 which is citation of the report of the case before the Probate Division. It is presumed that Lord Jowitt was referring to J V J [1947] 2 All.E.R.43. See also L V L [1922] 38 T.L.R.(NS) 697 a case the facts of which are indistinguishable from those in J V J (both were cases of sterility artificially produced before marriage, but the operation had left the husband in J V J able to achieve penetration and emission).

3. [1945] 2 All.E.R. 197.

4. Baxter V Baxter, op.cit., p.891.

5. [1832]1, Fit.4 para 6 cited in Baxter V Baxter ibid.

of Scotland).

"So then it is not the consent to marriage, as it relateth to the procreation of children, that is requisite; for it may consist, though the woman be far beyond that date: but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds; as the general end of the constitution of marriage is the solace and satisfaction of man...".

It may, however, be noted that sterility effected through a medical operation, without the other spouse's consent, and without good medical reason, may amount to a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury. Consequently it may provide a ground for divorce on the ground of cruelty.¹

A further word is necessary in view of two Indian features which may not occur to a reader of English cases. Firstly it is definitely in the public interest in India that the rate of growth of the population should be cut and permanent or temporary sterility in males by operation is encouraged. If such an operation is performed before marriage nullity for impotence at the instance of the wife

1. See Bravery V Bravery (C.A.) [1954] 1 W.L.R. 1169 and cases cited therein, specially Denning, L.J.'s (as he then was) dissenting judgment.

must be excluded, since orgasm as such is not necessarily ~~desired~~^{absent} here because the operation in question does not prevent erectio et intromissio. Secondly, the Hindu religion regards marriage as a means to the birth of sons, and marriage without the possibility of sons or at least one son is offensive to Hindu ideas. In fact members of the Hindu public have suggested that bigamy should be rendered legal even under the HMA or that the HMA is unconstitutional in so far as it does not allow plural marriages, in cases where the first wife is sterile. It is not impossible that the modern Hindu law offends traditional sentiment in withholding nullity (since plural marriages are excluded, barring a change of religion) from a husband whose wife is sterile at the time of the marriage whilst allowing him nullity when her organs incurably prevent intercourse. But this is a by-product of the wholesale adopting of foreign laws by an Asian jurisdiction.

(4) Nervous and/or psychic disorders:

A marriage may be annulled on the ground of impotence where the respondent was incapable of sexual intercourse due to an invincible repugnance to the act of sexual intercourse because of a nervous and/or psychic disorders.¹ This

1. See Forel, Sexual Question and Psychic Impotence [1935] pp.85 and 219. See also T. Rangaswami V T. Arvindammal A.I.R. 1957 Mad. 243-4 at p.245.

averment may be universal or ^oquā hanc or hunc.

(a) Universal:

The view has been taken that latent incapacity, which would make the consummation of marriage impracticable, arising from hysteria due to nervous affection or invincible repugnance would amount to impotence.

In Wilson V Wilson,¹ for example, where the petitioner showed that he made several attempts to consummate the marriage shortly after its performance and at various subsequent intervals, on each occasion the respondent evinced great aversion to the act of sexual intercourse ... and became hysterical. Tapp, J, granting a nullity decree observed that "²... where there is wilful wrongful refusal of sexual intercourse due to incapacity arising from nervousness or hysteria or from an invincible repugnance to the act of consummation, thus rendering the consummation impracticable, a Court is justified in declaring such a marriage to be null and void on the ground of impotence." Similarly, in Kishore Sahu V Snehprabha Sahu,³ where every attempt of the husband to consummate the marriage immediately reduced the wife to a state of hysteria, e.g., she bites and

1. A.I.R. 1931 Lah. 245.

2. *ibid* at p.246.

3. A.I.R. 1943 Nag. 185.

kicks and cries bitterly so that it is impossible to obtain consummation, it was held by the Court that, "¹The law regards this as impotence on the part of the woman...".

(b) Impotence quoad hanc or hunc:

In the earlier times it was uncertain whether an allegation that a respondent is impotent quoad hanc or hunc is valid to support a decree of nullity.² The law on the subject has been stated by Sanchez,³ as gathered from Thomas Aquinas and Albertus Maguis, in such a form as to admit of no other conclusion "Quid refert, sive a natur rive ex accidenti" - the "accidens" here considered being the lack of inclination of a particular man to a particular woman - "impotentia promanet,⁴ ad irritandum matrimonium? Si vere impotentia utraque sit, imp~~edi~~atque potestatem tradendi corporis ad copula conjugalem: eo quod illud accidens reddat eam impossibilem". And again: "Quacunque ex causa impedimentum perpetuae impotentiae consurgat,

1. A.I.R. 1943 Nag 190.

2. Both before and after the Council of Trent, the doctrine of the Church admitted, and indeed enjoined nullity on such a ground.

3. Disputationes de sancto

Matrimonii sacramento (1654) Book 7, vol.II, p.336, cited in C V C [1912] p.399 at pp.400-401.

4. This compound verb promanere is noted in the list of barbarous and unauthorized words at the end of Forcellini's lexicon. In the next line the sense appears to require alterutra See ibid., p.400.

dissolvetur matrimonium ea cognita, utpote quod irritum fruit." "Perpetua", as is obvious from the context, is used to describe a condition in relation to a particular woman, subsisting, "mediis adhibitis ac experientia trienuali praemissa".

(i) The origin of the doctrine:

The leading case on the question is divorce proceedings between the Lady Frances Howard, Countess of Essex, and Robert Earl of Essex¹ although there were circumstances of grave suspicion and doubts appear to have been entertained by the minority of the court as to the validity of a decree based upon the quoad hanc doctrine. The memorandum in which the then Archbishop expressed his doubts is so confused that it is impossible to ascertain whether they related to the facts or the law. The King said, as to doctrine of quoad hanc, that such defects are tricks worked by the Devil. The precedent, as to the King's letter to the Archbishop, is the case of Abimelech who becomes frigid when he attempted to enjoy Sarah, the wife of Abraham.² In Countess of Essex's

1. Cobbett's Complete Collection of: State Trials (1613) to Vol.II, pp.786-862.

2. Gen. 20.3.

case it was alleged that,¹ "... the said Earl hath had, and hath power and ability of body to deal with other women, and to know them carnally ... that he can have no copulation with the said Lady Frances". In this case the delegates deciding,² ... that the Earl of Essex, for some secret, incurable, binding impediment, did never carnally know, or was or is able carnally to know the Lady Frances Howard ..." declared the law to be,³ that impotentia coeundi in viro who-soever, whether by natural defect, or accidental means whether absolute towards all, or respective to his wife only, if it precede matrimony, and be perpetual, is a just cause of Divorce a vinculo matrimonii.

This doctrine was indirectly recognised in the Duchess of Kingston's case⁴ and Bury's case,⁵ adopted and

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1. Countess of Essex Case. Cobett: / at p.786. In Green-street, falsely called Cumyus V Cumyus [1812] 2 Phillium. ELL 10 = 161 ER 1062, although there was no allegation of impotence quod hanc nonetheless the marriage was annulled where the medical report stated that "...though the disease, and imperfection of the parts, was not such as to imply impotency to the execution of their functions; yet that, having heard his own accurate history of his alleged impotence, they [the doctors] put faith in his account; and as he was in good health, they could hold out no hopes of his impotence being remedied by any medical treatment."
2. Countess of Essex's Case cited above p, 804.
3. *ibid.*
4. Cobett: State Trials. [1716] Vol. 20 p. 355
5. 5 Co-Rep. 96b = 77 E.R. 207 (year not mentioned in the report).

discussed in N - R V M - e¹ and firmly established in C V C.² In Duchess of Kingston's case³ and Bury's case⁴ it has been stated, respectively, as if enunciating a platitude, that, "... the fact of a man propter impotentiam marrying another woman and having children does not prove the judgment false," "for one may be habilis quoad hanc." and a man divorced by reason of perpetual impotency in himself marries again, the issue of the second marriage is legitimate for "it is clear that by the divorce causa frigiditatis the marriage was dissolved a vinculo matrimonii, and by consequence each of them might marry again." In N - R V M - E,⁵ Dr. Lushington discussed the matter, a decree of nullity was granted by reason of the husband's impotence where the medical inspectors reported that his impotence was not apparent, but that he was impotent quoad his wife. Dr. Lushington laid down a rule of common sense to be applied in such cases, when he said, "... the report of the medical gentlemen in this case narrows the averment to impotence to quoad hanc. Does the rule of law do more, or rather can it by possibility do more? The rule of law and the report necessarily go on the same grounds, and no other, the non-

1. [1853] 2 Rab. ECC 625 = 163 ER 1435.

2. [1921] p.399.

3. [1776] 2 Co. Rep. 355

4. 5 Co-Rep. 96b = 77 E.R. 207.

5. Cited above

consummation after opportunity, who by possibility can say that such a man is necessarily impotent as to all women? It may be so, or it may not. There can be no evidence to establish the affirmative, as the evidence of such cohabitations is necessarily impossible. The utmost that can be said is, that there might be something of a guess made, by reason of the failure; that the probability is that a man, impotent quoad hanc, would be impotent as to all; this however would be inference, not proof. Who can tell the physical cause of that one failure, when the man is apparently without defect?

It is not until the judgment of Lord Birkenhead, L.C., in C V C¹ that we reach firm ground. The allegation in this case was that the respondent is incapable of consummating this particular marriage with this particular woman (i.e. the petitioner). C V C may, therefore, be read as deciding that an averment of impotence quoad hanc may be sufficient to support a decree of nullity.

The doctrine of quoad hanc or hunc may be of special importance under HMA, which leaves a loophole, since it casts no slurs, in effect, upon either spouse. An illustration as to where it might be useful has been provided by

1. [1921] p.399.

Professor Derrett¹ in the following terms. "... spouses who feel that their marriage is an insult to both, since each is in love (actually or in imagination) with someone else, may agree that "impotence" is their way out...". The Court will look therefore very closely into the medical history of the marriage and require the evidence of the spouses to be corroborated.²

(ii) Illustrations of impotence quoad hanc and hunc in Indian cases.

The leading case on the question is S V B,³ a case under Parsi Marriage Act, where the plaintiff alleged that the husband was unable to consummate the marriage because of his general impotence, i.e., impotence as to women in general. This general imputation was abandoned when the medical inspectors found that there was no apparent defect in the defendant. The plaintiff, at the trial, limited her case to one imputing impotence only as regards copulation

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1. See J.D.M. Derrett: Aspects of Matrimonial Causes in Modern Hindu Law [1964] *Revue du sud-est asiatique*, p.236; Introduction to Modern Hindu Law, S 210 pp.139-40.
 2. See Arun V Sudhansu A.I.R. 1962 Or.65 SB - petition for nullity on the ground of impotence quoad hunc.
 3. [1892] I.L.R. 16 Bom. 639.

with her. The delegates unanimously found that the consummation of marriage has been, and is, from natural causes impossible, because from the time of the marriage it was physically impossible for the defendant to have intercourse with the petitioner by reason of his impotence as regards her. Jardine, J, annulling the marriage(following N - R V M - E¹ where Dr. Lushington, pointed out that on the report of the medical gentlemen the averment of impotence was narrowed to quoad hanc, and that proof of such limited averment did not amount also to proof that the man was "necessarily impotent as to all women",²) held, on the finding of the delegates, "...that section 28 of the Act includes the physical defect found-"

The dictum in H V H,² (a case under Indian Divorce Act) is an even clearer instance of the application of the doctrine of impotence quoad hanc, where it was alleged by the petitioner that the husband was impotent so far as she is concerned, and that in fact the marriage was never consummated. The husband admitted that after the first fortnight he never had intercourse with his wife because he

1. [1892] ILR 16 Bom. 639

2. *ibid* at p.644.

3. A.I.R. 1928 Bombay 279.

felt a coldness towards her, but he alleged that the marriage was consummated. Marten, C.J., refused to grant a decree of nullity, since he did not believe the wife's story as to non-consummation of the marriage. The learned judge applying C V C¹ (where Lord Birkenhead L.C., held that a decree of nullity can be pronounced in a case like the present where, although the husband is not impotent as regards all women, he be regarded as impotent in fact, as regards a particular woman, viz. his wife) observed that,² "... we think there would be jurisdiction to pronounce a decree on the merits, provided the Court was satisfied that no intercourse took place between the parties ...". Similarly, in Bull V Bull,³ the petitioner alleged that the respondent wife was incapable of consummating the marriage and stated that the capacity consisted of a nervous and/or psychic disorder and/or of an invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner was concerned; a decree of nullity was refused merely due to petitioner's delay in presenting the petition. McNair, J,

1. [1921] P.399.

2. H V H A.I.R. 1928 Bom. 279 at p.280.

3. A.I.R. 1938 Cal. 684.

held that, "...¹ If the petitioner establishes the form of repugnance, that would in my view be sufficient to satisfy the requirements of S.19 [of the Indian Divorce Act 1869] for it would apparently constitute a permanent physical disability."

(5) Failure to consummate the marriage:

A practical disability for sexual intercourse, on the part of the alleged impotent spouse, may be inferred² under section 114 Indian Evidence Act from a failure to consummate (distinct from wilful refusal to consummate) the marriage after a reasonable time. The view has been taken that such an inference may be drawn when after a reasonable time, during which the petitioner was willing, anxious and repeatedly urged to consummate the marriage, it is shown that there has been no sexual intercourse.³ However, no

1. A.I.R. 1938 Cal. 684.

2. S.114 provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business; in their relation to the facts of the particular case." We must understand that circumstances favouring an inference of impotence are not reasons for disability.

3. See G V G [1871] 2 Pand D 287 (where the parties had slept together for two years and ten months but the wife had never permitted the husband to consummate the marriage because of her condition which was hysterical and to a certain extent beyond her control. There was

such presumption can be drawn merely from the fact that the wife was unwilling to live with the husband.¹ Such inference is readily drawn in case of a man. The reason may be found in Dr. Lushington's observations in Pollard V Wybourn,²

"Here [where the woman was Virgo intacta and apta viro twelve years after the marriage] are the very strongest grounds to presume the impotency of the man. If the parties lay together in one bed for so many years, ... and the woman is certified to remain virgo intacta, there can not be a stronger presumption that impotency existed, and that it was incurable."

no physical reason for denying intercourse. The marriage was annulled on the ground that the marriage would ever be consummated).

F V P [1896] 7s L.T.192 (where the parties slept together but the wife habitually wrapped her night clothes and bedding around her and absolutely refused all sexual intercourse). The Court inferred incapacity. See also B V B [1901] P.39 (wherein it was the husband who was adjudged impotent). See also S V B [1905] 21 T.L.R., 219; S V S [1908] 24 T.L.R. 253; C V C [1911] 27 T.L.R. 421; F V P [1911] 27 T.L.R. 429. W V W [1912] P78. (The wife refused to live with the husband and consummate the marriage, impotence inferred); G V G [1924] A.C.349 (It was held that the repeated and continued refusal of the wife to have sexual intercourse over a long period of time, though there was no structural incapacity, requires the Court to draw the inference that she does not have the psychological capacity to engage in the act).

1. Emmanuel Singh V Kamal Saraswati A.I.R. 1934 Pat.670.
2. [1828] 1 Hogg. ECC. 725 at 728 = 162 E.R. 732 at 733.

The question is: what is meant by a reasonable time? Is it possible to lay down a particular period? The answer appears to be that no hard and fast rule can be laid down.

In Coral Indira V Iswariah,¹ for example, where the petitioner gave the respondent ample opportunity ... for seven months and trying her best ... to induce him to have sexual intercourse with her, the Court passed a decree of nullity on the ground of impotence.

Similarly in S V S,² the Court did not think, on the facts of that particular case, that three months was enough. However, in C V C,³ Bargrave Deane, J, was prepared to infer incapacity on the part of the wife, where the parties never lived together at all, because of her absolute refusal to live with her husband. Whereas in F V P,⁴ there was one attempt made by the husband during the day time. The wife was hysterical. They never spent a night in the same room, and on the facts of that particular case Bargrave Deane, J, was prepared to infer incapacity. The proposition is reinforced by Barnard, J,'s dictum in B V B⁵ where

1. A.I.R. 1953 Mad. 858.

2. [1863] 3 SW and Tr. 240 = 164 E.R. 1266.

3. [1911] 27 T.L.R. 421.

4. [1911] 27 T.L.R. 429.

5. [1958] 2 All. E.R. 76.

incapacity on the part of the husband was inferred only after seven days cohabitation. The learned judge observed that,¹

"I have come to the conclusion, on the evidence put before me, that no amount of time would help this marriage to be consummated. The husband had ample time during the seven days of the honeymoon to consummate the marriage and he was unable to do it..."

(6) Refusal to undergo medical examination and/or treatment:

Similarly, a practical disability for sexual intercourse may be inferred by the Court where the respondent refuses to undergo medical examination and/or treatment. In Kanti Lal V Vimla,² (a suit for dissolution of marriage on the ground of wife's impotence) where the wife was examined by medical practitioner before the suit was filed, it was held that Court can draw adverse inference from her subsequent refusal in suit to submit for re-examination by the same doctor.

In some cases the Court has held it proper to grant an annulment on the ground of impotence where, in addition

1. [1958] 2 All. E.R. 78.

2. A.I.R. 1952 Sau. 44 at pp.44-5.

to evidence of a persistent refusal to consummate the marriage, it appeared that the defendant refused to submit to a medical examination as ordered by the Court. In W V W¹ it was held that the refusal of the wife to live with the husband and consummate the marriage coupled with her statement that she will not take medical advice and with the fact that she declined to be medically examined pursuant to the order of the Court, entitles the Court to infer that² "some impediment exists pointing to incapacity on her part to fulfil the obligations of a wife, whatever that impediment or incapacity may be."

IV. Proof of Impotence:

A petitioner is entitled to petition for a decree of nullity after the discovery that the respondent is incapable from structural malformation, or otherwise, for sexual intercourse upon which the Court may grant a decree on affirmative evidence, either proved or inferred from the facts (Inference dealt with above) by the petitioner. The

1. [1912] P 78.

2. *ibid* at p. 82.

See also B V B [1901] P 39 (wherein it was the husband who was adjudged to be impotent); S V B [1905] 21 T.L.R. 219; S V S [1908] 24 T.L.R. 253; C V C [1911] 27 T.L.R. 421; F V F [1911] 27 T.L.R. 429.

question is: what is the media and standard of proof in such a case?

(1) Media of proof:

Impotence may either be proved by medical examination of the parties or by examination of the parties as witnesses.

(i) Medical examination:

The Courts have a wide discretion in ordering physical examination of the party alleged to be impotent.¹ The practice of the ecclesiastical Courts was to make mandatory orders for medical examination by doctors appointed by the Court. These orders are still made, under Matrimonial Causes Rules, 1950, in nullity suits on the ground of incapacity. However, as we have seen a refusal to undergo such an examination would give rise to an inference of impotence (see p.207 above).

The general rule is that impotence may be established by the medical examination of the parties. However, the certificate of a doctor is not conclusive in itself. The certificate of the doctor, who examined either or both the parties, must be strictly proved and the doctor must convince the Court as to correctness of his conclusions.²

1. P. V. Deolalkar, *Hindu Marriage Act*, 1955 p 96

2. Coral Indira V Iswariah 1953 Mad. 858; T. Rangaswami's case 1957 Mad. 243 at 299.

(ii) Examination of the parties as witnesses:

The question arose: what is the effect of admissions by the respondent? Is corroboration required?

(a) Effect of admissions:

The Court would act on the admissions of the respondent and the party is not obliged to lead other evidence to establish the facts admitted, unless the litigation is collusive. The admissions may be ignored, as observed by the Supreme Court in Mahandra V Sushila,¹ "on the grounds of prudence only." (As value of admissions see p. 542 below under concealed-pregnancy).

(b) Corroboration:

The question was considered by Lord Penzance in U V J,² where, on the general point as to kind of corroboration required, the learned judge said,³

"to pronounce a marriage invalid on the unsupported oath of the party who seeks to be relieved from its obligations is a serious matter, within the province of the Court, no doubt but only to be done when the last trace of reasonable doubt as to the truth and bona fides of the case has been removed. If there be a direct conflict of testimony

1. [1964] Bom. L.R. at p. 681
 2. [1868] L.R. 1 P.D. 460.
 3. *ibid* 461.

between the two parties who alone know the truth, ... the difficulties are much increased."

It is clear from this judgment that corroboration may not be essential, but it is required whenever there is the slightest suspicion of collusion. Singleton, L.J., in Hodgkins V Hodgkins¹ (C.A.) observed, as to corroboration, that "... in a case of this nature corroboration is not essential. At the same time every judge looks for corroboration. If there be no corroboration ... then the judge will exercise even greater care than he normally does to make sure that the case is proved before granting the relief which is prayed." Similarly, Ramaswami,² J, laid down that "even uncorroborated testimony of the petitioner is sufficient if it can be believed. In cases of this nature, corroboration can only be obtained from the evidence of the other party to the marriage."

The dictum of Ramaswami, J, in T. Rangaswami V T. Arvindammal, it is submitted, is not quite correct for the

1. [1950] 1 All. E.R. 619 at 622.

2. T. Rangaswami V T. Arvindammal A.I.R. 1 as 7 Mad. 243 at 249.

evidence of impotence from other sources is possible.¹ However, it is submitted that, Ramaswami, J,'s observation "... even uncorroborated testimony of the petitioner is sufficient if it can be believed ..." may be taken as implying that such testimony is sufficient where there is no suspicion of collusion.

(2) Standard of proof:

There is no minimum standard of proof. The proof must be, as used to be expressed in the Ecclesiastical Courts in England, not suspicio probablis but has to be Vehemens proesumptio.² The view that³ "since there is a strong presumption in favour of the validity of a marriage

1. T. Rangaswami V T. Arvindamma A.I.R. 1957 Mad 243, at 249 following Kishore Sahu V Snehpraleta, A.I.R. 1943 Nag. 185 (it was observed "The conduct of the parties subsequent to the marriage would be important? Did they speak of the impotency to anybody? was it mentioned to any friend or relation or to their parents? If not, why not? Would it be natural not to do so? or was there no opportunity? It would not be natural for every body to speak these matters to another. A reserved or shy or reticent person would not. On the other hand, other types almost certainly would whether the parties to the case fall within the one class or the other, it is for the trial judge to discover).
2. T. Rangaswami V T. Arvindammal, A.I.R. 1957 Mad. at p.
3. See Rayden on Divorce at p.118.

the Court requires to be satisfied beyond reasonable doubt that a spouse whose impotence is alleged was at the time of the marriage and has been thereafter incapable of consummating it," must not be taken as an indication that proof of impotence is to be regarded on the same footing as proof for quasi-criminal offence. "Proof beyond reasonable doubt", it is submitted, is a reasonable conclusion based on fair inferences which would "satisfy" a prudent man, i.e., the judge, that the respondent is and has been impotent (as to a discussion of standard of proof see below, ³³⁷)

✓ Factors Limiting jurisdiction:

A decree of nullity may be refused due to lack of sincerity of the petitioner or where the marriage has been approbated by the petitioner.¹ A decree may also be refused if the petition is presented or prosecuted in collusion with the respondent.² Similarly, a decree may be refused where the petitioner is taking ^{advantage} of his or her own disability.³

(1) Sincerity or approbation:

^{of sincerity}

The term sincerity, which has been considered by

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- 1. S.23(e)
 - 2. S.23(d)
 - 3. S.23(a)

Lord Bramwell¹ as "a most remarkable expression, a curious word", appears to have been derived from a dictum of Sir William Scott in Briggs V Morgan² where he observed that, "... there are, however, rules adapted to cases brought forward with sincere motives...".

The question of "sincerity", in spite of Lord Selborne, L.C.'s view that³ "[sincerity] suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not...", has a special and limited meaning and is to be confined to the sincerity of the plea and, in the words of Langton, J,⁴ "... has nothing whatever to do with either (a) the general character of the petitioner as a sincere person, or (b) the conduct of the petitioner before [his or] her marriage or the motives which prompted [him or] her to enter into the marriage."

The limitation upon the ordinary meaning of the word "sincerity" was defined by Langton, J, in Nash V Nash in the following terms:⁵

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1. G V M (P.C.) [1885] 10 AC. 171 at p.201.
 2. [1820] 2 Hog. Con. 324 at 330 = 161 E.R. 758 at 760.
 3. G V M Cited above at 186.
 4. Nash V Nash [1940] 1 All. E.R. 206 at 209.
 5. ibid at 214.

"The petitioner must be sincere in the sense of not having wavered in [his or] her view as to the action [he or] she would take to assert [his or] her rights after [he or] she attained full knowledge of the facts and the law concerning those rights. The Court will not allow a petitioner, after attaining such knowledge, to approbate the contract of marriage and obtain rights and benefits thereunder for a term of years and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which [he or] she had long elected to ignore" i.e., there must be no other motive on the part of the petitioner than a desire to obtain redress for a grievance really entertained.

(b) Approbation:

The general principle appears to be that¹ "... there may be conduct on the part of the person seeking this remedy which ought to stop that person from having it; as for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or

1. *C.M.* [1885] 10 A.C. 171 at 186 (H.L.).

has taken advantages and derived benefits from the matrimonial relation which it would be unfair or inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed."

The expressions "sincerity" and "approbation" both apparently ^{imply} ~~mean~~ the same thing, i.e. that the petitioner has approved the marriage.¹ This is all very relevant to Indian conditions, under which matrimonial proceedings are often started to further a family quarrel and grounds are raked up if not invented, and the injuries or complaints in fact have long been condoned or winked at.

(c) Test:

The test to be applied in such cases has been laid down by Evershed, M.R.,²

"Has the husband or wife (as the case may be) by conduct or overt acts consistent only with such affirmation approbated the existence and validity of the particular marriage, whatever may be its particular attributes?"

(i) By conduct:

(a) In R V R,³ the wife respondent suffered from an

1. See D. Lasok: "Approbation of Marriage and Validation" [1963] 26 Mad. L.R. 249 at 250.

2. W V W (C.A.) 1952 All.E.R. 858 at p. 862-63.

3. [November 14, 1934] unreported case cited in Latey on Divorce, p.202.

incurable defect - a thick membrane which prevented penetration for more than one-and-a-half inches. Sir Boyad Merriman, P, however, was satisfied that prior to the marriage on frequent occasions the husband had such incomplete intercourse as was possible and married the wife knowing well that there was a physical obstruction. After the marriage the wife underwent medical examination and the husband was appraised of the full position, but expressed himself quite content to go on with the marriage notwithstanding. That form of sexual relation went on for over three years, and there was medical evidence that the membrane had been stretched to some extent. The President, basing himself on the principle enunciated by Lord Selborne in G V M, dismissed the petition, and his decision was upheld by the Court of Appeal.¹

(b) Acceptance of Material benefits:

A petitioner may be estopped from asserting that the marriage is voidable if the petitioner, ^{Continues to accept} with the knowledge of the facts and law, material benefits to which he or she would be entitled only on the assumption that the marriage is valid.²

1. [February 25, 1935] unreported case cited in Latey on Divorce, p. 202.
 2. ~~See~~ [1885] 14 A.C. 171 (H.L.)

In Tindall V Tindall,¹ the wife, after stating that she proposed to commence nullity proceedings on the ground of her husband's impotence, unsuccessfully took proceedings against him in a magistrates Court, charging him with desertion and persistent cruelty. She then appealed to the Divisional Court and obtained an order that the husband should pay £15 into court as security for the costs of the appeal. Singleton, L.J., thought that,² "... the application that the husband should lodge £15 security for the costs of the wife's appeal to the Divisional Court, coupled with his doing so, may be said to be a pecuniary benefit to her ... which ought to estop her from subsequently asking for a decree of nullity."

(ii) By overt acts:

Strong evidence will be required to rebut inference of approbation of the marriage where the petitioner has either submitted to artificial insemination treatment and/or adopted a child provided the petitioner had had sufficient knowledge of the facts and the law when she had the insemination treatment and/or adopted the child. Similarly, an inference may be drawn where the petitioner husband or the

1. [1953] 1 All. E.R. 139.

2. *ibid* at p.144.

wife continues to live with the respondent for a considerable period of time in such circumstances.

(a) Artificial insemination:

The leading case on the topic is L V L¹ (also known as R.E.L. V E.L.)² in which the petitioner was the wife and the incapacity was on the husband's side. The wife was anxious to have a child and discussed artificial insemination with the husband. She was artificially inseminated from husband, but she had no success. However, she continued her attempts to inseminate herself artificially from the husband. There were further ineffective attempts to consummate the marriage, and the wife urged the husband to undergo psychological treatment, which he did. However, the treatment did not make the efforts to consummate any more effective than they had *been before, and the* husband had taken steps, by consulting a doctor, to try to improve his condition but without success. The wife had been artificially inseminated from her husband's seed, and at the time she presented her petition, though she did not then know it, she was pregnant as a result of the insemination. The argument for the husband was that the act plus

1. W.W. (C.A.) [1952] All.E.R. 858 at pp.862-863.

2.1.[1949] 1 All. E.R. 141.

3.2.[1948] P.2.11.

the consequence of the artificial insemination amounted to such approbation of the marriage on the wife's part that it would be wrong and unconscionable and against public policy for her now to be heard to say that the marriage should be annulled. It appeared that throughout the period the wife had written making it plain beyond a peradventure that, for her, normal sexual intercourse was an essential condition to the marriage. It also appeared that the wife's dominant motive in conceiving the child was the hope that the advent of a child might help her and her husband to have normal sexual intercourse. Pearce, J,¹ annulled the marriage because he thought that "... she never intended to approbate an abnormal marriage" (i.e. the petitioner intended subjectively to affirm or acquiesce in an abnormal marriage). The question is: whether in view of the test laid down by Evershed, M.R., L V L is of doubtful authority. It is submitted that formula adopted in L V L (i.e., "intending to approbate an abnormal marriage) must be regarded as unsatisfactory because the "overt acts on the part of the wife would appear consistent with approbation of the marriage. However, on its particular facts, L V L may be supported because the consistent and clear expression by

1. [1949] 1 All. E.R. 141 at p.145.

the wife or her insistence on normal physical relations affected and qualified the nature of, and the true interpretation to be given to, the act and consequence of the artificial insemination relied on as constituting approbation. In Slater V Slater (C.A.)¹ where the marriage was never consummated owing to the husband's incapacity the wife underwent treatment by way of artificial insemination from a donor other than the husband. The wife was granted a decree on the ground that during the time of the treatment by way of artificial insemination the wife did not have a sufficient knowledge that the law provided a remedy, i.e., if she had had sufficient knowledge of the law when she had the insemination treatment it might have amounted to approbation of the marriage (as to adoption see below 2²¹).

(b) Adoption of children:

The leading case on the question is: W V W (C.A.)^{2.} where on the suggestion of the petitioner, after he realised his wife's incapacity to consummate the marriage, there had been the adoption of the two children, the first of whom had died before the adoption of the second. The Court (Evershed, M.R., Jenkins, L.J. and Hodson, L.J.) were of the

1. [1953] 1 All. E.R. 246.

2. [1952] 1 All. E.R. 858

opinion that the petitioner knew both the facts and the law, and that, in view of all the circumstances, (i.e., that the husband initiated the adoption in the hope that the wife would overcome her repugnance to intercourse) there was approbation of the marriage, and the petitioner was held not to be entitled to a decree of nullity. The principle is succinctly stated by Jenkins, L.J.,²

"The adoption of a child ... is a solemn act which involves a representation to the Court in the case of joint adopters that the joint adopters are husband and wife. On that representation ... the Court will make an order which transfers the adopted child from the legal protection of its natural parents to the legal protection of its statutory parents, as the adopters by force of the order in effect became It seems to me difficult to imagine any act by two spouses which could more clearly affirm the existence and validity of their marriage." Similarly, in Slater V Slater³(C.A.), as we have seen (p. above) the marriage was not consummated due to the husband's incapacity. The parties took to live with them, in the same month in which the wife underwent treatment by way of artificial insemination

1. [1952] 1 All. E.R. 858.

2. *ibid* at p.864.

3. [1953] 1 All. E.R. 246.

a boy aged two years with a view to adopting him. In course of time an adoption order was duly made and the artificial insemination treatment ceased. However, the wife took legal advice and was informed that, if she could prove the husband's impotence, there was available to her the remedy of nullity. Karminski, J, although satisfied that the incapacity was proved, arrived at the conclusion that the wife by her actions had approbated the marriage, and that, therefore, she was not entitled to the relief sought. However, the Court of Appeal granted a decree of nullity to the wife on the ground that the wife did not have sufficient knowledge of the law when she adopted the child. Singleton, L.J.,¹ observed that,

"... All the circumstances must be examined to determine whether there has been approbation of the marriage so that it is inequitable or against public policy that the petition should be granted. The matters on which the most reliance was placed were the adoption of the child and the artificial insemination treatment of the wife. Both those took place before the wife had knowledge that she had any remedy. So far as I can see, there is nothing which occurred after she had that (somewhat hazy) knowledge which counts either way."

1. [1953] 1 All. E.R. ^{246 ax} 248.

For India the argument that the wife did not know the law is likely to be important. Ladies are commonly ignorant of their ordinary legal rights let alone the technicalities. Solicitors are seldom consulted by ladies direct and their knowledge is seldom as good as that of their relations ^{who} may or may not advise them honestly.

(2) Delay:

Mere delay in presenting the ^{petition} ~~petition~~, if it can be satisfactorily explained, may not necessarily bar the remedy. However, if the petitioner, knowing that he can obtain a decree of nullity, continues to live with the respondent wife or the husband for a considerable length of time, this may amount to approbation, e.g. in Scott V Scott¹, where the husband had been content with a marriage without sexual intercourse for some five years and now sought relief in order to marry another woman, the Court held that he could not obtain a decree. However, in G V G² a decree was

1. [1959] 1 All. E.R. 531.

2. [1960] 3 All. E.R. 56. See also Clifford V Clifford (C.A.) [1948] 1 All.E.R. 394 (where the parties cohabited for 17 years and the husband used every proper means to overcome his wife's aversion to the sexual act. There was a delay of some 36 years in presenting the petition. The delay of 9 years was due to his saving up so that he would have enough money to commence the proceedings. However, he also had a further reason for doing so as the

continued:

granted after twelve years during which time the husband never expressed satisfaction with the marriage and wished the wife to have an operation which would have enabled her to consummate it. The distinction between Scott V Scott and G V G is subtle. In the former case the husband was asking for a decree due to collateral motives, i.e., to marry another woman, whereas in the latter the husband, insisting that the wife should have the operation, never had approbated the marriage.

(3) Collusion:

Collusion may be defined as the presenting or prosecution of a nullity petition by a bargain or agreement between the parties as their agents, to pervert the course of justice, whereby the true facts are hidden or facts pretended, if not invented, for a purpose of securing a nullity decree.¹ Obvious examples are where the petitioner pays the respondent not to defend the petition, or where the

time, e.g., that he would be retiring in three or four years time and would not then be in a position to keep both himself and the respondent. The Court held that he had never approbated the marriage. The delay of 17 years was reasonably explicable on the grounds that the husband was still seeking to achieve consummation, and the further period of nine years was also explained by his having to save up to bring the petition.

1. Rayden on Divorce 240; Latey on Divorce p.141; Lowndes V Lowndes [1950] 1 All.E.R. 999.

respondent agrees with the petitioner to co-operate~~u~~ where the nullity is sought on the ground of impotence quoad hanc or hunc.

(4) Taking advantage of his or her own disability:

The question is: whether an impotent spouse could plead his or her own impotence as a ground for obtaining a nullity decree? It appears that an impotent spouse could not plead his or her own impotence as a ground for obtaining a decree of nullity if the petitioner himself is aware of his or her own impotence and knowingly deceives the other spouse into contracting marriage, or if, at the time of the ceremony, he or she knew that the respondent was impotent. Similarly, it may be unjust in the particular circumstances of the case that the impotent spouse be granted a decree on the ground of his own impotence.²

(i) Where the petitioner knowingly deceives the other spouse:

It is self evident that it would cover a case where the petitioner is aware of his own impotence at the time of the marriage and is found to have deceived the respondent

1. Emanuel V. Emanuel [1946] P.115.

2. See Harthan V. Harthan [1948] 2 All.E.R. 639 at 644 (C.A.).

into the marriage.

(ii) Where the petitioner knew that the respondent was impotent:

Similarly, this covers a case where a person enters into a marriage with a person who is so crippled that he or she realises that sexual intercourse will be impossible. In such a case, however, if the petitioner founded his or her claim to the relief on the respondent's impotence as opposed to his or her own, it is submitted that, he or she would be refused relief on the ground that he had approbated the marriage.¹

(iii) where it may be unjust:

The test as to what may be unjust was laid down by the Court of Appeal in Pettit V. Pettit:² whether in the particular circumstances of the case it would be unfair and inequitable to grant relief.

In Pettit V. Pettit³ the husband and wife cohabited for about twenty years during which the husband made several attempts to have intercourse, but without success. However, a child was born as a result of fecundatio ab extra. The husband fell in love with another woman. Notwithstanding

1. See J V. J [1947] 2 All.E.R. 43 (C.A.).

2. [1962] 2 All.E.R. 37 (C.A.). See also M v M [1965] The Times 9th Oct.

3. *ibid.*

this, the wife did her best to persuade the husband to remain with his family, but without success. Later the husband learned for the first time that he could, as a matter of law, file a nullity petition and he accordingly did so. Davies, L.J., applying Harthan V. Harthan¹ thought that in a case such as this the Court must look at the whole of the circumstances, including the wife's attitude and reaction to the situation created by the husband's impotence, in order to see whether it was just and equitable to grant the husband a decree against a wife in no way responsible for the non-consummation.

VI. Impotence in Kenya and Uganda Law:

A marriage may be annulled on the ground of impotence, under the Kenya² and Uganda³ law, respectively, where "either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage" and "the respondent was permanently impotent at the time of the marriage."

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1. [1948] 2 All.E.R.639 (C.A.) (In Harthan V. Harthan, the husband, who had been unable to consummate his marriage was held to be entitled to succeed. In Harthan's case the petitioner had not known of his defect until after the celebration of the marriage. Similarly, the petitioner had not deceived the respondent about his condition).
 2. Cap. 157.S.11(1)(b)(i) The [Kenya] Hindu Marriage and Divorce Ordinance 1960.
 3. Cap.112. S.13(1)(a) The Laws of the Uganda Protectorate Vol.III, p.1547.

The terms "permanently Impotent" and "incapable of consummating the marriage" would mean, as under HMA, a practical disability for sexual intercourse due to some malformation and/or invincible repugnance to the act of sexual intercourse generally or quoad hanc or hunc due to nervous and/or psychic disorder either proved as a fact or inferred from the conduct of the alleged impotent spouse.

It is submitted that general principles, as to impotence, applicable to a case under HMA may be equally applied to a case under Kenya and Uganda Ordinance.

CHAPTER V
"MENTAL INCAPACITY"

I. Introduction:

A marriage may be annulled, under HMA, on the ground that either party was at the time of the marriage an idiot or a lunatic.¹ The expressions used in parallel provisions of the Kenya² and Uganda³ law are, respectively, "of unsound mind or subject to recurrent fits of insanity or epilepsy" and "lunatic and idiot".

The provisions of HMA seem to have been based on, section 19 of the Indian Divorce Act, 1869 and closely resembles with the parallel provisions of the Uganda law, whereas the provisions of the Kenya Ordinance appear to have been based on the [English] Matrimonial Causes Act, 1950,⁴ section 8(1)(a)(b) reenacting section 7(1)(b) of the

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1. S.12 read with S.5(ii).
 2. Cap. 157, S.11(b)(ii). The [Kenya] Hindu Marriage and Divorce Ordinance, 1960.
 3. Cap. 112, S.13 (1)(c). The Laws of the Uganda Protectorate [1951] Vol.III, p.1547.
 4. MCA, S.8(1)(b) 1950, provides as follows: "...that either party to the marriage was at the time of the marriage of unsound mind or [was then suffering from mental disorder within the meaning of the Mental Health Act, 1959 of such a kind or to such an extent as to be unfitted for marriage and the procreation of children], or subject to recurrent [attacks] of insanity or epilepsy". N.B. The words in square brackets were substituted by the Mental Health Act 1959, Sched.7.

continued:

Matrimonial Causes Act, 1937.

Since after, and not seldom because of, marriage one or even both spouses may develop acute nervous or mental disorders, such as, anxiety, neurosis, ~~depression~~, hallucinations, delusions, and other maniacal symptoms, particularly, schizophrenia (now more readily recognised than in former years); and since the symptoms, their recurrence, duration, and severity might not offer grounds for divorce; it may be desirable to consider whether want of capacity to marry existed at the time of the marriage. Evidence of mental derangement after marriage may be sought to be used to upset the marriage itself. Therefore the accurate definition of ground for nullity for want of mental capacity is highly desirable. The position, as we shall see, is far from

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1. See also S.7 of [New York] Domestic Relations Law cited in Grossman, New York Law of Domestic Relations S 85 at p.53. As to "mental incapacity in "nullity" generally see, S.V. Gupte, Hindu Marriage Act, pp.108-110, 185-86; P.V. Deokelkar, The Hindu Marriage Act, 1955, pp.37-40, 96-7. D.H. Chaudhry, The Hindu Marriage Act, 1955, pp.83-4; 206-7; J.D.M. Derrett, Introduction to Modern Hindu Law, pp.153-56, 188-89; D.F. Mulla, Principles of The Hindu Law, p.802, 845; T.P. Gopala Krishna, Codified Hindu Law, pp.112-14, T.P. Gopalakrishna, Hindu Marriage Law, 94-95; Shiv Gopal, The Hindu Code, pp.302-3, 343-45; Dr. Gyan Prakash, The Hindu Code, 276; 313; Ajit Gopal, Commentary on Hindu Law (Past and Present) p.100- See also J. Jackson, The Formation and Annulment of (101. Marriage, pp.186-89; American Jurisprudence, vol.35, pp.247-53; American Jurisprudence 2d. vol.4, pp.458-60; McCurdy, W.E., "Insanity as a Ground for Annulment or Divorce in English and American Law, printed in Selected Essays on Family Law, published by The Association of American Law School.

satisfactory so far as the actual verbal framework of the law goes. But there is no evidence that up to now any injustice has resulted, at least so far as post-1955 Hindu law is concerned.

The pre-1955 Hindu law recognised the validity of the marriage of an idiot or a lunatic, on the footing that marriage was a samskara¹. The objection to this position² in part facilitates the abolition of the ancient rule, but only to the extent of making marriages voidable, for mental incapacity.

Mr. Gupte³ asks: "Will such a marriage [i.e. of an idiot or a lunatic] be voidable and annulled by the Court if the person who was a lunatic or idiot at the time of the marriage has ceased to be so at the time of the filing of the petition or at the date of the hearing of the petition?" It is submitted that in such a case, if the idiot or the lunatic spouse consents to the marriage, the marriage may not be annulled for as has been observed by Professor Derrett,⁴ it would be against public policy to annul such

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1. Venkatacharyulu V Rangacharyulu [1890] 14. Mad. 316,318; Bhagwati V Parmeshwari [1942] All. 518,589-90; Amirthammal V Vallimayil Ammal [1942] Mad. 807 F.B.
 2. Mayne: Treatise on Hindu Law and Usage, 10th ed. 153; Derrett: "Nullity in Hindu Law of Marriage" [1952] 54 Bom. L. R.117.
 3. Hindu Marriage Act, pp.185-86.
 4. Introduction to Modern Hindu Law, pp.188-89 at p.189. See J. Jackson: The Formation and Annulment of Marriage, 80-81, and cases cited therein.

a marriage.

II. Meaning of "idiot", "lunatic", "of unsound mind"etc.

The fact that these expressions have not been defined by the respective statutes in which they are used may create confusion and difficulties. Thus we must explore the different possibilities in order to explain the different expressions.

(1) "Idiot"

The term "idiot" has been defined in a variety of ways. As with other terms in our context it is not merely an English but a "Hindu Law" definition which is to be sought. The dictionary¹ defines it as "A person so deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct. Applied to one permanently so afflicted, as distinguished from one who is temporarily insane, or 'out of his wits', and who either has lucid intervals, or may be expected to recover his reason." An idiot or fool natural is a person who from his birth, by a perpetual or incurable infirmity, is of unsound mind."²

The Mitakshara³ defines the Sanskrit jada⁴ (an idiot)

1. Murray: A New English Dictionary, vol.5, p.21 at p.22.

2. Earl Jowitt: The Dictionary of English Law, p.934.

3. Ch. II, S.10, para.2. (Colebrook's trans.)

4. At Yajñ II, 141.

as, "a person deprived of the internal faculty; meaning incapable of discriminating right from wrong". Coke¹ and Blackstone² defined it, respectively, as, "he which from his nativitie, by a perpetual infirmitive is non-compos mentis" and "a person without any glimmering of reason". Whereas Macnaghten defines an idiot as "A person deprived of internal faculty, meaning one incapable of discriminating"³. "A person not susceptible of instruction";⁴ "one who can not support the performance of duties";⁵ "devoid of knowledge of himself, and one whose mental faculties are imbeciled";⁶ "one who is incompetent to judge between what is beneficial and mischievous".⁷

Professor Derrett⁸ and Deoalkar⁹ define an idiot, respectively, as "... an idiot is congenitally incapable of distinguishing right from wrong" and "... of unsound mind since his birth without lucid intervals ... A person

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1. Institutes of the Laws of England revised by F. Hargrave etc. vol.2, S.403, 246b, 247a.
 2. Commentaries on the Laws of England [7th Edn.] vol.I, p.304.
 3. W.H. Macnaghten: Principles and Precedents of Hindu Law, vol.II, p.135. (cited in Tirumaanagal V Ramaswami [1861-63] 1 MHCR 214).
 4. ibid Citing Jimutavahara.
 5. ibid Citing Raghunandara.
 6. ibid Citing Chandevera.
 7. "The Hindu Marriage Act, 1955", p.37.
 8. ibid Citing Misra.
 9. Introduction to Modern Hindu Law, p.153.
 9. The Hindu Marriage Act, 1955, p.37.

who has no understanding or reasoning, and who is unable to protect his own interests..."¹

The expression "idiot" in addition to the above definitions has been defined in various cases. In Munishwar Dutt V Indrakumari,² Tekchand, J, defined an idiot as, "... a person who is destitute of intellectual power whether the incapacity is congenital or developmental or accidental. It consists in total want of reason". Similarly in Tirumamogal V Ramaswami, Holloway, J,³ observed, "we are fully satisfied that an idiot in Hindu law is one of unsound and inbecile mind who has been so from the birth". Sulaiman, J,⁴ (observing that, "We are not bound by the definition of an "idiot" as found in medical literature,

1. See also Shiv. Gopal, The Hindu Code, at p.343. ("In its ordinary significance the word 'idiot' means a person deficient in mental or intellectual faculty as to be incapable of ordinary acts or reasoning or rational conduct");

D.F. Mulla, Principles of Hindu Law, p.845 ("In the present context it means a person so deficient in mind as to be permanently incapable of rational conduct... An idiot is one born without any glimmering of reason.

D.H. Chaudry, The Hindu Marriage Act, 1955, p.206. ("An idiot is one who is of unsound mind from the birth without lucid intervals"); S.V. Gupta, Hindu Law of Marriage, p.109, (defines idiot, Citing Concise Oxford Dictionary), as "...one who is so deficient in mind as to be permanently incapable of rational conduct").

2. A.I.R. 1963 PU 449 at p.458.

3. [1863] 1 MHCR 214.

4. Mt. Title V Alfred Robert Jones A.I.R. 1934 All.273. See p. 284.

we have to read the word 'idiot', used in section 19, Divorce Act, as a word used in its ordinary significance), explained the word "idiot" as, "one can not be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence". In R. Muthammal V Sri Subramaniaswami,¹ Hidayatullah, J, considered a person as insane who appeared to be a moody, silent, gloomy and sickly person with a vacant look, who was unable to answer even the simple question about his name. It is interesting to note that the [English] Mental Deficiency Act, 1927,² defines idiots as "persons in whose case there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers"; but this would, it appears, be too narrow a test for the purposes of Hindu law.

(2) "Lunatic"

The expression "lunatic" like "idiot" is defined in different ways. The dictionary³ meaning of lunatic is "a person of unsound mind, a mad man". Derrett⁴ and Deokalkar⁵ define it, respectively, as "... one whose mental faculties

1. A.I.R. 1960. S.C. 601, see p.608.

2. S.1.

3. Murray: A New English Dictionary, Vol.VI, part (i) p.502.

4. Introduction to Modern Hindu Law, p.154.

5. The Hindu Marriage Act, 1955, p.37.

are totally, though not necessarily incurably, wanting", and "... insane ... a person who has lost the use of his reason by disease, grief or accident..." whereas Raghuvachariar¹ and Mulla² define it, respectively, in the following terms, "In the case of a lunatic there is a mental eclipse which supervenes in a normal man due to various causes which makes him incapable of judging between right and wrong" and "... one that had understanding but has temporarily or permanently lost use of reason by disease, grief or other cause.

The HMA is framed in such terms as emphatically to suggest that Parliament understood by "idiot" and "lunatic" two different grounds of incapacity to marry; yet the question remains: whether the expression "lunatic" can be used synonymously to comprehend both "idiot" and "lunatic"?

The answer is not easy to state. There are statements, on the one hand, in Munishwar Dutt V IndraKumari³ and Weinberg V Weinberg,⁴ to the effect that the term lunatic and lunacy include every kind of unsoundness of mind except idiocy. On the other, we find that "lunatic",

1. Hindu Law. Principles and Precedents, p. 438
2. Principles of Hindu Law, 12th Edn. p.845.
3. A.I.R. 1963, PU. 449 at p.453.
4. [1938] 8 N.Y.S. 2d. 341 at p.344.

according to the Indian Lunacy Act¹ as likewise the English Lunacy Act,² means "an idiot or person of unsound mind".

The confusion arises due to use of quaint language and it is submitted that modern terminology should be introduced into the nullity legislation.

However, it is submitted that the expressions "idiot" and "lunatic" are not interchangeable for a serious distinction has always been recognised between a lunatic and an idiot. The one might have a lucid interval; the others no power of mind whatever.³ It is relevant to add that lunacy being a disqualification at Hindu law from inheriting, sharing at a partition, giving and taking in adoption and some other acts of legal significance the law has been obliged to define the term closely and the question has arisen whether lunacy must be congenital in order to operate as a bar. No such discussion has ever arisen in the case of idiocy which at Hindu law has been (as we have seen from the reference to the Mitakshara above) an independent and additional disqualification.

1. [1912] 3(S).

2. [1870] S.90.

3. See Weinberg V Weinberg [1938] 8 N.Y.S. 2d. 341 at 344; Munishwari Dutt V Indrakumari A.I.R. 1963, PU 449 at p.453.

(3) "Of unsound mind or subject to recurrent fits of insanity or epilepsy".

It is not always safe to attempt to define a phrase such as the phrase "of unsound mind...", as Sir Boyd Merriman, P, pointed out in Randall V Randall¹ (and followed Mr. Commissioner Latey, Q.C., in Lock V Lock)² there is a great risk that in attempting to define the words used by Parliament fresh difficulties will be created; the result may be to make confusion worse confounded. Admittedly, no distinction is to be drawn, according to the view of Sir Boyd Merriman, P, expressed in Smith V Smith,³ between the phrase "unsoundness of mind" on the one hand and the word "insanity" on the other. However, it is submitted that, the use of the word "fit", though apt in connection with epilepsy, is not suitable in connection with insanity for unsoundness of mind is specified as being a ground, if it exists at the time of the marriage, while the word "insanity" is here used in connection with being subject to recurrent fits of insanity.

The meaning of "insanity",⁴ according to the

1. [1939] P.131 at 137.

2. [1958] 3 All. E.R. 472.

3. [1940] P.179 at p.181.

4. Murray: The Shorter Oxford English Dictionary Vol.I, p.1013.

dictionary, is, "the condition of being insane; or unsoundness of mind as a consequence of brain disease; madness, lunacy"; and "insane"¹ is defined as being "not of sound mind". It is not certain, according to Merriman, P,² why the one phrase is used in one part of the section, and the other phrase in the other. Now to consider the phrase, "subject to recurrent fits of insanity", the word "fit"³ is defined as "paroxysm, a sudden and severe, but transitory attack of illness, spec. a paroxysm of lunacy" whereas "paroxysm"⁴ is defined as (in pathology) an increase of the acuteness or severity of a disease usually recurring periodically in its course". Thus it means that the respondent was subject to an increase of the acuteness or severity of unsoundness of mind recurring periodically in its course.⁵

The phrase "person of unsoundness of mind or ... fits of insanity or epilepsy" designates cases of a very wide range of mental infirmity. Thus the question arose: whether this phrase may be taken to "equate with the terms" "lunatic" or "idiot". The answer is that it may be so taken.

In Whysall V Whysall,⁶ for example, Phillmore, J,

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1. Murray: The Shorter Oxford English Dictionary Vol.I, p.1012.
 2. [1940] p.179 at p.181.
 3. Murray: cited above, p.706.
 4. Murray: *ibid* Vol.II, p.1436.
 5. Smith V Smith [1940] F.179 at p.181.
 6. [1959] 3 WLR 592 at pp.598-599.

considering the Mental Treatment Act, 1930, which provides that "The word 'Lunatic' (except in the following contexts, that is to say, in the phrase 'criminal lunatic'...) shall cease to be used in relation to any person of or alleged to be of unsound mind and there shall be substituted for that word whenever it occurs ... the expression 'person of unsound mind' or 'of unsound mind' or such other expression as the context may require", observed that "Here Parliament is equating the term 'lunatic' with the phrase 'a person of unsound mind'".

III. Test of Mental Incapacity:

The question is: what degree of mental incapacity or what extent of intellectual alienation is required in determining whether a spouse is an idiot or a lunatic or a person of unsound mind? Is it a question of mere weakness of intellect, or must the spouse be incapable of entering into financial agreements.?

(1) Weakness of intellect:

Mere weakness of intellect, it is submitted, may not be sufficient mental incapacity which may be relied upon to annul a marriage. People differ from one another in degree of intelligence possessed by them. Indeed, it would be a

pity if a marriage were annulled simply because one of the spouses lacks intelligence.

The proposition may be illustrated by early English and Indian cases. We will consider cases in which it was held that there was sufficient mental capacity to solemnize a valid marriage and cases where such mental capacity was held to be lacking.

(a) Where mental capacity was found:

M'Adam V Walker¹ is the leading illustration where, a man sometimes insane, contracted a common law marriage with his mistress during lucid intervals. Lord Eldon, C., observed that,² "with respect to the evidence adduced here, there was no doubt but an unsound state of mind might manifest itself by an accompanying ill state of bodily health. But it was admitted that the mind was in a sound state before, then they were to look at the state of bodily health; not as in itself an evidence of mental derangement, but with a view to ascertain what effect it had on the state of the mind. Then after looking at the evidence ... who declared that he was in a perfectly sound state of mind, it would be taking a liberty which man ought not to take with man to

1. [1813] 1 Dow, P.C. 148 = 3 E.R. 654.

2. M'Adam V Walker [1813] 1 Dow, P.C. 148 = 3 E.R. 654 at 664.

say, that Mr. M'Adam, at the time of the marriage, was not competent to contract." In Harrod V Harrod,¹ Sir W. Pagewood (V.C.) did not find any evidence of the unsoundness of mind, where a woman deaf and dumb from childhood was alleged not to have understood the marriage ceremony and nor to have been able to give her consent on the ground that, "²... the only fact brought forward to support this is, that she did not know the value of money".

In Durham V Durham,³ Sir J. Hanen,ⁿ did not think that a young lady, who was very shy before marriage and became unquestionably insane two years after the marriage was of unsound mind at the time of the marriage. Similarly, in Cannon V Smalley,⁴ Sir, J, Hannen, P, dismissed the husband's petition for nullity of marriage by reason of the insanity of the respondent at the time of the marriage, where a young woman seemingly normal before marriage became morbid immediately after marriage and in a short time unquestionably insane. The learned President observed that "⁵... she was then suffering in physical health, and it might be in this case that physical had something to do with

1. [1854] 1 Kay and J = 69 E.R. 344.

2. *ibid* at 13 = p.348.

3. [1885] LR 10. 80.

4. [1885] L.R.10, p.96.

5. Cannon V Smalley, *op.cit.*, at p.98.

mental health, and that even that date the balance of the respondent's mind was unsettled and likely to be upset; but the question to be decided is whether it is shown to have been upset on ... the date of the marriage" and he did not find evidence to sustain the proposition that she was so incapable.

(b) Where want of mental capacity found:

The leading case on the question appears to be Turner V Meyers;¹ Sir William Scott (as he then was) pronounced a marriage null and void where, the son of a country gentleman, who was subject for thirteen years to attacks of delusional insanity, (occurring generally in the fall and spring) married while on a visit to London to a woman he met on the street. In Browning V Reaye² where a woman of seventy, with considerable means, married a man aged 40 it was alleged that, at the time of that marriage being solemnized, the woman was incapable, from a mental deficiency, to contract a marriage. It was alleged that she was always from her youth a silly or foolish person, possessing a very weak understanding, which nearly approached idiocy. Sir John Nicholl³ declared the marriage a nullity on the ground that

1. [1808] 1 Hogg. con. 414 = 161 E.R. 600.

2. [1812] 2 Phillim. ECC.69 = 161 E.R. 1080.

3. ibid at 81 = p.1084.

"... A more complete picture of a poor crazy old woman can not well be drawn than is here exposed; totally incapable of doing any one rational act, and never having through life, but particularly in the latter part of it, held a rational conversation, or done any one act in the management of herself or her property". In Lady Portsmouth V Lord Portsmouth,¹ the Court annulled a marriage where a nobleman of weak and deranged mind married the daughter of his trustee. Sir John Nicholl found against the marriage "the nobleman "²... being at that time not of sound mind sufficient to enter into such a contract". Lord Penzance, following Turner V Meyers,³ in Hancock V Peaty,⁴ found it impossible to doubt that the alleged lunatic was the subject of insane delusions at the time of her marriage, although the evidence clearly showed great eccentricity. However, the Court, after reviewing the facts came to the conclusion that⁵ "The symptoms point to no other conclusion; they are not reconcileable with mere eccentricity..."

The Court pronounced a decree of nullity by reason of the respondent's insanity at the time of the marriage in

1. [1828] 1 Hagg. 355 = 162 E.R. 611.

2. *ibid* at 374 = at p.617.

3. [1808] 1 Hogg. Con. 414 = 161 E.R. 1080.

4. [1867] 1.L.R. Pd. 335.

5. *ibid* at p.339.

Hunter V. Edney.¹ In this case the young woman had marked delusions as to crimes committed by her and she was on the morning after the wedding in an extreme state of melancholia, and requested her husband to cut her throat. Similarly, the marriage was annulled in Jackson V Jackson,² where an artist, who was always of retiring and somewhat morbid disposition and developed parav^oia about eighteen months after the marriage was found to be of unsound mind at the time of the marriage.

The proposition may also be supported by the Indian cases where the view has been taken that a person, who is although deaf or dumb but whose mental faculties are unimpaired³ or who is not up to the ordinary standard of human intelligence or endowed with the capacity to manage his affairs properly⁴ or who suffers from foolish hallucinations⁵ or who is alleged to be eccentric or deficient to certain extent merely in his mental capacity⁶ or mere imbecile⁷(sic.) or dull of understanding,⁸ is not an idiot or a lunatic.

1. [1881] L.R.P. 10 at p.93.

2. [1908] p.308.

3. Ran Bijai Bahadur V Jagat Pal Singh [1890] 17 I.A. 173 = I.L.R. 18 Cal. 111 P.C.

4. Surti V Narain Das [1890] I.L.R. 12. All. 531, 533.

5. Moujilal V Chandrabati [1911] 38 I.A. 122 P.C.

6. G.E.G.R. V E.M.R. 1925 Sind. 25.

7. Mt. Titli V Alfred Robert Jones, A.I.R. 1934 All.273.

8. Kanhaiyalal V Harsing A.I.R. 1944, Nag. 232.

Similarly, a person who drinks hard and is not generally in a sober state of mind¹ or who is alleged to be "childish" given to exaggerated emotions"² or who suffers from a sudden attack of mania affecting him temporarily is not mentally incapable, for our purposes, it appears.

(2) Capacity to enter into a financial agreement:

The fact that a spouse alleged to be idiot, lunatic or a person of unsound mind, was incapable to enter into a valid contract may not be indicative of sufficient mental incapacity to marry at the time in question. The view,³ that "... the basis of mental incapacity is the inability to enter into a valid contract ..." is, it is submitted not correct because a person may lack mental capacity in one respect and not in all respects. A person who is not capable of dealing with the problems of a "take-over bid" is not lacking mental capacity to marry. A person may have sufficient capacity to solemnize a valid marriage, though he may not have capacity to enter into a financial agreement or contracts generally notwithstanding that the marriage itself gives rise to rights and liabilities of a financial character⁴

1. Jainarain V Mahabir Prasad A.I.R. 1926, Oudh. 470.

2. Kaura Devi V Indra Kumari A.I.R. 1943 All.310.

3. Shiv Gopal : The Hindu Code (2nd Edn. p.302.

4. J.D.M. Derrett: Introduction to Modern Hindu Law, p.155.

The question is: can there be different standards of mental capacity for making a contract and entering into a marriage?

The question was considered by Karminski, J, in Park V Park,¹ where taking the view² "that a lesser degree of capacity is required to consent to a marriage than in the making of a will" the learned judge observed that "³... marriage in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend". In this case the testator married and on the same day executed a fresh will. He was then an old man, suffering from mental and physical weakness. He showed little interest in the details of the business, being sometimes confused and sometimes lucid. He also became forgetful and untidy, and was quite unable to look after his financial affairs. It was held that the marriage was valid but the will was void because, it was held, the testator was not of sound mind, memory and understanding.

The question was again considered by the Court of Appeal,⁴ on appeal in the same case. "The contract of marriage", according to Birkett, L.J.,⁵ "in its essence is

1. [1953] 2 All. E.R. 408.

2. *ibid* at p.413.

3. *ibid* at p. 414.

4. In the Estate of Park, Park V Park (C.A.) [1953] 2 All. E.R. p.1411.

5. *ibid* at p.1434.

one of simplicity." Birkett, L.J., citing Sir James Hannen, P., 's observations in Boughton V Knight,¹ that "The question² of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it", observed that, "³So, there can be no doubt that there are degrees of unsoundness of mind, and, of course, there can be degrees of capacity quite apart from unsoundness of mind. Some men are very able and some are not, and it is understandable, for example, that an illiterate, uneducated man, perfectly sound of mind, but not of a high quality, might be able to understand the contract of marriage in its simplicity, ... but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, quite apart from any question of unsoundness of mind."

Hodson, J.,⁴ considering the question whether consent to a marriage required a lesser degree of unsoundness of mind than that required to make a valid will, was of the opinion that, "... there is no sliding scale of soundness of mind by reference to which different matters of which the law is required to take cognisance may be measured".

1. Boughton V Knight, [1873] 3 P.65.

2. ibid, p.73 n.

3. Park V Park (C.A.) [1953] 2 All.E.R. 1434.

4. Park V Park [1953] ibid at p.1435.

It appears that in considering the question, therefore, a degree of mental capacity, large allowance must be made for the difference of individual character. However, there is express authority in Ertel V Ertel¹ that "It is a matter of common knowledge that many married men or women continue in a satisfactory marital status although they may not possess high grade mentality or be successful in the conduct of business ventures and that many of them are acting with the aid of conservators."²

(3) Test of mental incapacity:

The difficulty of laying down any general, comprehensive test to be applied for determining mental capacity or intellectual alienation which may be relied upon to annul a marriage has frequently been recognised, and, it is submitted, each case must be considered on its own facts.

The leading case on the question appears to be Browning V Reave,³ where Sir John Nicholl put as a test,

"[Whether the respondent was]... incapable, from mental imbecility, to take care of his or her own person and property." However, the question was minutely investigated in Durham V Durham,⁴ where Sir James Hannen, P, laid

1. [1942] 40 NE 2d 85 at 89.

2. i.e. trustees.

3. [1812] 2 Phillim. ECC. 69 at

4. [1885] 10 PD 80.

the test as,¹

" ... a capacity to understand the nature of the contract, and the duties and responsibilities which it creates."

In a similar case, Hunter V Edney,² Sir James Hannen, P, observed that,³

" The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from morbid delusions upon the subject." This statement was adopted by Bargrave Deane, J, in Jackson V Jackson.⁴ Similarly, Sir Henry Duke, P,⁵ observed, ^{in Foxley V Foxley} as to the test to be applied, where he stressed the difficulty of formulating the right test,⁶

" The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. Now that the respondent knew that he [or she] had proposed marriage and

1. [1885] Pat p. 82.

2. [1885] 10 PD 93.

3. *ibid* at p. 95.

4. [1908] p.308.

5. [1923] 39 TLR 658.

6. *ibid*, 661.

the effect of the ceremony and its primary consequences I cannot doubt, but whether his [or her] mind at the time was in such a condition that he [or she] appreciated and understood the effect of the ceremony is more doubtful."

The test of mental incapacity which may be accepted as satisfactory is provided by Singleton, J, in Park V Park¹ and by Heen, J, in Johnson V Johnson,² respectively, as "was [the party alleged to be idiot, or lunatic or a person of unsound mind on the date of the ceremony] capable of understanding the nature of the contract into which he [or she] was entering, or was his [or her] mental condition such that he [or she] was incapable of understanding it", and "... whether there is a capacity to understand the nature of the contract and the duties and responsibilities created thereby...".

It is submitted that the above tests must be accepted under the HMA. It is obvious that in order to ascertain the nature of marriage a person must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage.

1. (C.A.) [1953] 2 All.E.R.1434.

2. [1960] 82 ALR 2d. 1029.

IV. Presumption of sanity and burden of proof:

There is a presumption of sanity in favour of the validity of a marriage, solemnized in due form, and the burden is on the party alleging mental incapacity, which is to be determined on the facts of a particular case.

The leading case on the question is Munishwar Dutt V Indrakumari,¹ where Tek Chand, J, summarized the position as follows:²

"In cases where marriage is sought to be annulled on the ground of idiocy or lunacy of a spouse, the onus in support of the plea of insanity existing at the time of the marriage lies on the petitioner. Of course, where permanent insanity is shown, then it is for the respondent to show that marriage was performed during a lucid interval. The presumption is in favour of validity of marriage and in favour of mental capacity of the spouses entering into matrimony. As marital union is closely associated with peace and happiness of society in general and individuals and families in particular, the marriage should not be annulled on grounds of mental incapacity unless the evidence in support of the alleged idiocy or lunacy at the time of marriage is cogent and compelling. The petitioner in order

1. A.I.R. 1963 PU 449.

2. *ibid*, 455.

to succeed must make out his allegations clearly and beyond doubt. Courts must ... concentrate upon the real question in issue, namely, the degree of mental infirmity at the time of marriage invalidating its solemnization The standard of proof in such cases must approximate to satisfaction of the Court beyond reasonable doubt...." (as to what is "beyond reasonable doubt see p. 350 below).

The question arose: What is the effect of adjudication, prior to or after the marriage, that the person was of unsound mind? In the first case can the guardian form on behalf of the idiot, or lunatic, or person of unsound mind the intention to marry? So odd a notion must be contemplated at Hindu law in view of the history of marriage of mental defectives prior to 1955, to which we have already referred.

(a) Adjudication:

It is submitted that an adjudication, that a person was of unsound mind at the time of adjudication, prior to or after the marriage may not be conclusive as to the mental capacity of the person entering into a marriage. It is also submitted that such adjudication merely implies that the person so adjudicated is unable to take care of his or her own affairs and it would not amount to mental incapacity for our purposes if the person concerned fulfils

the test laid down (above, p.252), i.e., the person is capable of understanding not only the nature of marriage but also capable of appreciating the responsibilities involving with marriage. In Rameswari V Bhagwati Saran,¹ Mukerjee, J, explained that adjudication of a person as a lunatic may no doubt imply that he is not competent to manage his own affairs; but it need not mean that he is suffering from complete mental alienation. He may have sufficient reason still as to enable him to understand the ceremonies and take an intelligent part in them.

(b) Can a guardian form an intention to marry:

We will see that non-age is not a ground for annulling a marriage (see below, p.156^b) for the lack of consent by the minor is remedied by the consent of his or her guardian, i.e., a guardian can form an intention to marry on behalf of his ward. However, in case of an idiot, or a lunatic, or person of unsound mind a guardian, it is submitted, can not form an intention to marry on such persons behalf. The reason is not difficult to find. The "guardians", it has been said, "can not evince on the ward's behalf an intention which the ward himself is incapable of forming."²

1. A.I.R. 1950, F.C. 142.

2. J.D.M.Derrett, Introduction to Modern Hindu Law, p.156.

V. Mental incapacity in Kenya and Uganda:

In deciding a question, under Kenya and Uganda law, whether a person is of unsound mind or subject to recurrent fits of insanity or epilepsy or is a lunatic or idiot the position may be summarized, in the light of the above discussion, in the following terms, namely,

(1) Mere weakness of intellect or inability to enter into a financial transaction will not amount to sufficient mental incapacity to annul a marriage.

(2) The question of mental incapacity is one of degree and the following test must be applied: was the respondent capable of understanding and appreciating the nature, and responsibilities attached, of the marriage.

(3) the onus of proof is on the petitioner which must be proved strictly and the standard of proof is the satisfaction of a prudent man.

CHAPTER VI
FORCE AND FRAUD

I Introduction:

A marriage is voidable, under HMA, where the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud.¹ Similarly, under the parallel provisions of Kenya² and Uganda³ law a marriage may be annulled, on the ground of force or fraud. ^{in any case in which the marriage might be annulled on this ground by the law of England} However, it is to be noted that there is no⁴ mention of the application of English law, in Uganda, where the consent of the guardian was so obtained.

The object of this ground is to enable a marriage to be avoided if it was entered into (whether or not it was consummated) without the petitioner's free and full consent for it has been observed that, "It is no marriage in law where one of the parties was induced to enter into a matrimonial alliance under coercion, duress or fraud, evidencing want of free consent. A marriage procured by abduction,

1. S. 12(1)(c).

2. Cap. 157. S.11(1)(b)(iii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960.

3. Cap. 112. S.13(1)(e)(Law of the Uganda Protectorate).

4. S.9(3)(c) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.

terror or coercion has no sanctity...".¹ (On the total absence of consent irrespective of force or fraud see below 259-64).

(1) Necessity of Consent:

The personal consent of the bride, under the HMA, ^{Case of persons under the age of 18 or 16 or 14 (maybe)} is not a prerequisite. And since marriages of minors are in practice not void despite the terms of section 11² it follows as a matter of course that a child bride or groom cannot have her or his marriage annulled for non-age³ or

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1. per Text Chand, 5, in Kunta Devi V Siri Ram Kaluram A.I.R. 1963 PU 235 at 238. As to force and fraud in "nullity" generally, see, S.V. Gupte, Hindu Marriage Act pp.186-188; P.V. Dedalkar, Hindu Marriage Act, 1955, pp.97-101; D.H. Chaudhry, Hindu Marriage Act, 1955, 207-12. J.D.M. Derrett, Introduction to Modern Hindu Law pp.191-94. N.R. Raghavachariar, Hindu Law pp.925-30; D.F. Mulla, Principles of Hindu Law 846-47. T.P. Gopalakrishna, Codified Hindu Law pp. 167-8. T.P. Gopalakrishna, Hindu Marriage Law pp.137-38; Shiv Gopal, The Hindu Code pp. 95-96. Dr. Gyan Prakash, the Hindu Code p.313. Ajit Gopal, Commentary on Hindu Law (Past & Present) pp.110-2. J. Jackson, The Formation and Annulment of Marriage pp.190-205.
 2. HMA.
 3. See M.E. Kalawati V Devi Ram A.I.R. 1961 H.P 1 (held, the minority of the wife or her guardian in marriage in itself, not a ground for getting it declared null and void under S.11 or for its annulment under section 12(c).) Gmt. Naumi V Narotam A.I.R. 1963 H.P.15 (held, a marriage of a girl below fifteen years is neither void nor voidable). Mr. Premi V Daya Ram A.I.R. 1965 H.P. (held, ... the marriage of a minor wife is neither void or voidable...").

want of consent if the lack of personal consent has been properly made good by the consent of the guardian in marriage, who, in the case of the bride, is a functionary recognised by Hindu Law while, in the case of the groom, he remains a relative recognised only by Hindu custom. If the consent of the guardian in marriage was not obtained by fraud the minor has no relief open to him upon the ground of misrepresentation. However, the case of an adult is otherwise. An adult may go through a ceremony of marriage without giving full or free consent to be married.¹

The question is, what is the effect of total want of consent irrespective of force or fraud under HMA?

It is submitted that total want of consent, which may be either due to mistake in the identity of the person or due to mistake as to the ^{nature and} purpose of the ceremony, or where the marriage is solemnized during intoxication, renders the marriage void and not merely voidable just as in the case of want of ceremonies amounting to the mock marriage. ~~How-~~
~~ever, mistake as to the nature of a ceremony makes it~~
~~voidable only.~~

1. See J.D.M. Derrett: Introduction to Modern Hindu Law, pp.185-186. See also J. Jackson: The Formation and Annulment of Marriage, pp.200-4. Eversley on Domestic Relations (6th edn.) By Stranger-Jones, pp.27-29.

(a) Mistake as the identity of the person:

For example, take a case where A was given to understand that he was being married to B and, in fact, he was married to C, i.e. where one person is substituted for another.¹ If a person is so tricked at the marriage ceremony, the marriage would be declared void.² However, a mere mistake of name would not suffice i.e., where a man courts a woman who he thinks to be someone else, and in a totally different position to that in which she really is, and marries her, believing her to be that other woman, the marriage is valid, for he intends to marry the woman with whom he goes through the ceremony.

(b) Mistake as to the nature and purpose of the ceremony:

This may consist in the belief that the register office ceremony is a betrothal ceremony or a formality stating intention to marry at a future date,⁴ or a conversion

1. Harbhajan Singh V Smt. Brijbalab Kaur. A.I.R. 1964 PU 359 at 362.

2. R V Millis [1843-44] X cl. and F 534 = 8 E.R. p.844.

3. Beau Fieldings case

4. Kelly V Kelly [1932] 49 T.L.R. 99; Szapira V Szapira Cited in [1902] 24 T.L.R. 756 at 757 (where marriage ceremony was regarded by the petitioner as a formality stating intention to marry at a future date) Hall V Hall [1908] 24 T.L.R. 756; see also Ford V Stier [1896] p.1 (The court found that the petitioner had gone through the ceremony as one of betrothal and granted a decree of nullity for want of consent).

ceremony to another faith.¹

In Kelly V Kelly,² for example, a jewess, went through a form of marriage with a jew at an English registry office under the mistaken belief that it was a betrothal ceremony and that she would not be validly married until a jewish ceremony had taken place.

Lord Merrivale, annulling the marriage observed that,³

"it would be intolerable if the marriage law could be played with by people who thought fit to go to a Register Office, and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it ... after the ceremony had been performed there was never a question of conjugal relations and they never took place. That fact in the case, coupled with the facts of their jewish origin and racial community, justify me in saying that the petitioner when she went through the form or ceremony was not aware that it was a ceremony which would make her and the respondent man and wife."

Similarly in Valier V Valier⁴ the marriage was annulled, where an Italian man, who was not very quick on

1. Mehta V Mehta [1945] 2 All. E.R. 690.

2. Cited above.

3. Kelly V Kelly [1932] 49 T.L.R. 99 at 101.

4. [1925] 133 LT 830.

the uptake and not over familiar with the English language, was tricked by an English woman into going through a ceremony of marriage with her at a London registry office. The man had not the smallest idea that he was contracting a marriage. Lord Merrivale, P, observed that, "Matrimony is the acceptance by mutual consent of the parties of the married state with knowledge of the nature, the undertaking and generally of the consequences of the tie which is created. I believe, on evidence, that the petitioner did not know that he was going to be married, and I am satisfied that when he came away from the ceremony he was bewildered and did not know until the evening the effect of what had happened."

(c) Marriage during intoxication:

A marriage solemnised during intoxication, or induced by the use of drugs is void. Similarly, a marriage shall be void when it was contracted while one of the parties is hypnotised.² The reason for this is to be found in Sullivan V. Sullivan.³ In this case Sir William Scott considered a marriage solemnized during intoxication as

1. Valier V. Valier [1925] 133. L.T. 830 at 830.

2. J. Jackson, The Formation and Annulment of Marriage, pp.189-190.

3. [1818] 2 Hagg. Con. 238=161 E.R. 728.

solemnized under a,¹ "... disability natural or artificial which created a want of reason or volition amounting to incapacity to consent."

It appears that the HMA does not, as does the MCA, leave open other grounds of nullity which are not specifically listed. It is, however, submitted that a marriage may be annulled where a person goes through a ceremony of marriage without giving full or free consent, *E.g.*, where the misrepresentation is as to the nature of the ceremony. It is further submitted that want of consent, if not ^{cured} (by cohabitation, avoids a marriage even at Hindu law.

This submission is based upon the analogy of the

1. Sullivan V. Sullivan [1818] 2, Hag. Con. 238 at 246.

mock marriage. The HMA does not in so many words provide for a marriage to be declared null and void, whether performed before or after the passing of the Act, for want of due performance of the ceremonies customarily prevailing in the community or communities. Yet, as shown clearly in Bhaurao Shenkar Lokhande V State of Maharashtra,¹ a ceremony which lacks the usual forms may be treated as a nullity even though both parties thought they were marrying each other. This was a bigamy case. There need be no manner of doubt but that the law of India provides for a spouse to obtain relief on the ground that there was no marriage, though there might have been a mock marriage and even his or her consent to the latter will not deprive him or her of the plea, since it is ^{not} in the interests of society that mock ceremonies should be as effective as ones solemnized with due attention to form.

(3) The Concept of Consent:

The concept of consent in Hindu law of marriage, where obtained by force or fraud, has two completely different aspects and the question of consent of the parties arises at two stages. The first aspect is the consent required of

1. (1965) 67 Bom. L.R. 423 SC. *Considered above* p 119

parents or guardians in marriage. The second is the consent of the would-be spouses themselves. The consent of the would-be spouses themselves can itself be understood in two main senses. The one consists of such rationality of the spouses whereby the spouses shall be deemed capable of understanding the nature of marriage ceremony and physically apt to take part in it (i.e., this is basically a question of physical and mental maturity). The other takes for granted the existence of rationality in this sense.¹

(4) "Two stage theory":

The question of consent of the parties to the marriage firstly arises at the time when the parties consent to solemnize the marriage, i.e., betrothal, and secondly at the time when the marriage itself is solemnized. The view has been taken in Ananthnath V Lajjabati² and Harbhajan N. Singh V Smt. Brij Balab Kaur³ that fraud ~~according to~~^{to} be

1. Thanker V Jennison [1921] 61 DLR 161-162
J. Jackson: The Formation and Annulment of Marriage, p.178.
2. A.I.R. 1959 Cal. 778 at 779 (where it was alleged that the petitioner relying on the representation that the respondent was of sound health and was not suffering from any disease gave his consent to the proposal for marriage...")
3. A.I.R. 1964 PU p.359 at p.360 (where it was alleged that The consent of the petitioner to marry the respondent was obtained by making "wilful misrepresentation and fraudulent statement as to the fact of virginity and good character of the respondent. Pandit, J, observed (at p.362) that, "... 'fraud' as a ground for the annulment of the marriage under the Hindu Law is limited only to those cases where the consent of the petitioner at the solemnization of the marriage was obtained by some sort of deception."

a ground for the annulment of marriage is limited only to those cases where the consent of the petitioner was obtained by fraud at the solemnization of marriage and the consent at the first stage though obtained by fraud can not affect the validity of the marriage.

The question is: whether there is any justification in making a distinction between consent obtained by, as required under this clause, at the time of betrothal and at the time when the marriage itself is solemnized?

It is submitted that it is not desirable to make any such distinction because:-

(i) to do so would be to give unfair advantage to one of the parties which should not be allowed in the interests of public policy; and

(ii) the real test for annulling a marriage under this clause should be: whether an allegation (i.e. of force or fraud) comes within the definition (see pp. 271, 292 below) and test (see pp. 292 below) laid down in this chapter. If it fulfils the test, then there is no justification for making a distinction relative to the time when the consent was obtained.

(5) Scope of the Chapter:

We will identify in this chapter some of the

distinguishing characteristics of force and fraud in relation to marriage so that we can answer the questions: what constitutes force or fraud? when will force or fraud suffice to entitle the petitioner to petition for a decree of nullity? The answers are not easy to state. In attempting them we often become trapped in other definitions of force or fraud or think narrowly in terms of other statutes. We know, however, that these other definitions do not represent an accurate image of the kind of "force" or "fraud" needed.

II Force:

(1) Different meanings and their application:

The term 'force' has not been defined by the statute. The dictionary¹ meaning of force is, "physical strength or power exerted upon an object; the use of physical strength to constrain the action of persons; violence or physical coercion." In the parallel provisions of English² and American law³ the terms used are fear, threats and

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1. Murray: A New English Dictionary, vol.4, p.419.
 2. See Rayden on Divorce, p.318 and p.77; see also Latey on Divorce 18-19; Webb and Beavan, Sourcebook of English Law, pp.82-3; Eversley on Domestic Relations, pp.30-33; J.Jackson, The Formation and Annulment of Marriage, pp.190-94.
 3. See American jurisprudence vol.35, SS96-102, pp.242-45; S.7 American Jurisprudence 2nd vol.4, pp.254-58. of [New York] Domestic Relations Law Cited in Crossman, New York, Law of Domestic Relations, p.S.85, p.85; Fowler V. Harper, Problems of the Family, pp.189-95 at p.192.

duress. The dictionary defines fear¹ and threat,² respectively, as "to regard with fear; be afraid of (a person or thing as a source of danger, an anticipated event or state of things as painful or evil" and "to press, urge, try to force or induce esp. by means of menaces", whereas duress means, "³ constraint illegally exercised to force a person to perform an act". The term used in parallel provisions of the Special Marriage Act, 1954,⁴ is ^curiously, Coercion⁵ as defined in the Indian Contract Act. "Coercion", according to the Indian Contract Act,⁶ "is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever with the intention of causing any person to enter into an agreement".

The question is: whether Coercion as has been defined in the Indian Contract Act is the correct meaning of the expression force. Mr. Raghavachariar,⁷ is of the opinion

1. Murray: A New English Dictionary, vol.4, p.114.

2. ibid, vol.4 p.114.

3. ibid, vol. V, p.724.

4. S. 25(iii).

5. Coercion is defined by the dictionary in the following terms: "Constraint, Restraint, Compulsion; the applying force to control the action of a voluntary agent".

Murray: A New English Dictionary, vol.2, p.587.

6. S.15.

7. Raghavachariar: Hindu Law and Precedent, p.926. See also D.H. Chaudhry: The Hindu Marriage Act 1955, p.208.

that "the correct meaning of the expression is what Coercion means under section 15 of the Contract Act". However, it is submitted this is not so because (i) this is a definition which is very narrow in its scope since it covers only those acts forbidden by the Indian Penal Code; and

(ii) Force may be exercised by threats but those threats need not be such as may be held to be an act forbidden by the Indian Penal Code.¹ It is for this reason that the SMA, which could be expected to enlighten us, turns out to be unhelpful. The discrepancy is odd, and unexplained.²

(ii) Force in "Penal Code":

The expression "force" has been defined by section 15 of Indian Penal Code in the following terms:

"A person is said to use force to another, if he causes motion, change of motion, or cessation of motion to that other, if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying or with anything so situated that such contact affects that

1. See S.V. Gupte: Hindu Marriage Act, p.186. Also, P.V. Dedkar: Hindu Marriage Act, 1955, p.98.

2. One may note the Christian Marriage and Matrimonial Causes Bill, 1962 which is still before Parliament, in cl.25(1)(c) follows the HMA and not SMA.

others sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described;

First:- By his own bodily power.

Secondly:- By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly:- By inducing any animal to move, to change its motion, or cease to move".

The question arose: whether force as has been defined by the Indian Penal Code may be sufficient to entitle a petitioner to petition for a nullity decree? It is submitted, although the Indian Penal Code defines force elaborately, the expression "force", as defined by the Indian Penal Code, does not cover the technical meaning required for our purposes. In defining 'force' the Penal Code takes into consideration only physical force applied to person or property. However, we know that in marriage the 'force' may take the form of mental coercion as distinct from physical force.

(2)Force(2)Force in Nullity Proceedings:

"Force", in relation to marriage, has been defined by various writers in a variety of ways. Force according to Gupte¹ and Mulla,² respectively, "... would have a wider meaning than Coercion ... may be either physical or moral ..." and "... when used excludes any real consent altogether ...". Derrett³ defines it as, "where the petitioner has *been* reduced to a state in which he or she was incapable of offering resistance to coercion and threats...".

Force may be defined as power exerted upon an individual, in any way, with an intention to overcome his or her will and/or overpower his or her judgment, in order to induce him or her to enter into a marriage to which consent would not otherwise have been given, and actually so overcoming and overpowering.

The force which may negative consent may consist of threats of death or grievous physical harm, or threats of imprisonment or arrest. It may also consist of a threat of a less serious harm, but involving mental suffering, i.e., fear of some untoward circumstance happening (not necessarily to the party concerned, but to some third person whose interests are a concern to the party coerced).⁴

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- ^{Law of}
 1. Hindu Marriage Act, 186.
 2. Principles of Hindu Law, p.846.
 3. Introduction to Modern Hindu Law,
 4. Eversley on Domestic Relations, 31.

(3) Essentials of force:

It will be necessary to consider the particular factors which are regarded as constituting force. The degree of force required to satisfy the Court will also need to be discussed, as will the necessity that force be the inducing cause of marriage.

⑥ What constitutes force:

A decree of nullity will usually be granted on the ground of force consisting of threats of death or grievous physical harm for, it is submitted, such marriages are ordinarily doomed to failure at the outset, and only rarely do they work out advantageously to the people involved or the community as a whole.

The cases under this head may be divided into two groups. Firstly, cases in which the force was exercised by a man¹ on the petitioner wife or vice versa. Secondly, cases where force was exercised by third parties.

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1. The first case on the question appears to be Lady Fullwood's case [1638] Cro. Car 483 at 493 = 79 E.R. 1017 at p.1026, where a man, with the aid of a female relative, "Violently, and with force and against the will of the said Sarah, took and carried the said Sarah ... and married her. The Court held that "although this was not a marriage de jure, because she was in such fear (as she affirmed upon her oath) that she knew not what she answered or did, yet it is a marriage de facto, and is felony within the statute", ~~id.~~.

(c) Force exercised by the parties themselves:

In Hussein V Hussein,¹ for example, ~~where~~ the respondent induced the petitioner to marry him by threatening to murder her if she did not. Henns-Collins, J.,² did not have any hesitation in annulling the marriage on the ground that the respondent,

"dominated [the petitioner] by fear, and exercised the power which he had over her to coerce her into marriage."

Similarly in Scott V Sebright³ and Bartlett V Rice,⁴

1. [1938] p.159.

2. Hussein V Hussein [1938] p.159.

3. [1887] 12 PD 21 (The petitioner (a young woman of twenty-two years entitled to a considerable wealth) had become engaged to the respondent, and shortly after coming of age was induced by him to accept bills of considerable sums of money. The persons who had discounted these bills subsequently issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats, and being assured by the respondent that the only method of evading bankruptcy proceedings and exposure was to marry him. It was also alleged that the respondent frequently threatened her that unless she would marry him he would accuse her to her mother and in every drawing-room in London of having been seduced by him. In addition to this, the respondent immediately before the ceremony threatened to shoot her, if she shewed that she was not acting of her own free will.)

4. [1895] 972 LT 122. [A man threatened to blow her brains out if the girl, who rejected him, if she would not consent to marry him, and produced from his pocket a pistol, which he held at her head. She then promised to marry him, on condition that he put away the pistol, which he did. A few days later she went home, and shortly afterwards he intercepted her while on a railway journey and took her to the office of a registrar of marriages. During the marriage ceremony, she fainted; as soon as it was over, she got right away. The marriage was never consummated.]

the Court had no hesitation in declaring the marriage to be a nullity where the facts were identical for all practical purposes with those in Hussein V Hussein¹ Butt, J, and Sir F.H. Jevne, P, observed, respectively, in Scott V Sebright² and Bartlett V Rice³ ~~gave the reasons,~~

"...³ she had been seduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them; and that, therefore, there never was any such consent on her part as the law requires for the making of the contract of marriage..." and "I can not doubt the respondent exercised terrorism over her..."

In Miss Field's⁴ case and Cooper V Crane⁵ the marriage was held valid although in Miss Field's⁶ case the consent was procured by a threat not only to shoot the threatener himself but also the young lady's lover. In

1. [1938] P. 159.

2. [1887] 12 PD 21 at 31

3. [1895] 72 LT 122 at 124.

4. [1848] 2 H.L.C. 48 = 9 E.R. 1010. A Bill to Dissolve the marriage of Miss Field known as "Fields Marriage Annuling Bill" Lord Devon, with the concurrence of Lord Cottenham, Lord Lyndhurst, and Lord Denman, refused to move the second reading of the Bill to dissolve the marriage.

5. [1891] PD 369.

6. [1848] 2 HLC 48 = 9 E.R. 1010.

Cooper V Crane¹ the facts ^{were} ~~and~~ these:- The petitioner had rejected the proposal of marriage of her twenty-one year old cousin; but he obtained a marriage licence, lured her to a church and told her she must marry him or he would blow his brains out. She knew he carried a gun, and she went through the marriage ceremony but did not cohabit with him thereafter.

The decision in Miss Field's² case and Cooper V Crane,³ it is submitted, ^{may not be regarded as} ~~is not~~ good law in view of Scott V Sebright,⁴ Bartlet V Rice⁵ and Hussein V Hussein⁶ because in these cases also the petitioner was reduced to a state in which she was incapable of offering resistance to force.

(2)
(*) Force exercised by third parties:

A marriage may be annulled where a marriage is induced by force exercised by third parties and will also include cases where a man's consent for marriage is procured by threats of grievous bodily harm or death by the brother or father etc. where a man has ~~reduced~~ seduced a girl and/or caused

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1. [1891] PD 369.
 2. [1848] 2 HLC 48 = 9 E.R. 1010.
 3. [1891] PD 369.
 4. [1887] 12 PD 21.
 5. [1895] 72 LT 122.
 6. [1938] 6.159.

her to become pregnant.

(a) Force of a less serious nature:

Ankamma V Bamanappa¹ is an illustration in support of the proposition,

where the plaintiff sued for a declaration that the defendant was not his legally wedded wife and the allegations in the plaint imply either that there was no marriage in fact or in any event, it did not amount to a void marriage. It is common ground that the marriage, if any, took place under abnormal circumstances. The plaintiff alleged that he was never a willing party to this alliance, that the proposal was never mentioned to him till he actually found himself in the house in the neighbouring village that evening, that he was decoyed to that village, on a representation that he was merely going in search of a lost cow, that when he found himself in that house in the evening he was surrounded by people who had been got ready there beforehand, that it was only then that he was asked to go through a marriage form to which he objected, that he was compelled by some of the people assembled there to sit on the plank, that his hand was seized and made to tie the thali round the defendant's neck. The learned District

1. A.I.R. 1937 ^{Mad} ~~N~~ 332.

Judge accepted the plaintiff's story and found that the plaintiff could not have with his free will and consent entered into relationship of marriage with the defendant and that, if at all, there was only a farce of a marriage brought about by fraud or force. Vardachariar, J, dismissing the appeal by the wife, observed that,

"...¹ I am not able to say that the learned judge was wrong in holding that there was no legal relationship of husband and wife created between the parties by whatever ceremonial gone through at the time ... the mere fact that somebody else caught hold of his hand and made him to tie a thali round the lady's neck ought not, it seems to me, to be held to constitute a marriage..."

(b) Threats of death or grievous bodily harm:

In America the view has been taken that where a man has seduced a girl and/or caused her to become pregnant and where the family and friends of the girl bring pressure upon the man to marry the girl, it may safely be said that the Courts do not readily grant relief in such a case even though the seducer consents to the marriage with the greatest reluctance;² for it has been held that in such a case

1. A.I.R. 1937. Mad. 332 at 333.

2. American Jurisprudence vol.35, pp.241-45 at 244.
See also American Jurisprudence 2d. Vol.4, pp.254-58 at 257.

he has a moral duty to marry her.¹

It is submitted that this view may not be followed to a case under the HMA as either there is force or there is not. If there is force the consent is vitiated, and the question whether there is moral obligation or no moral obligation is irrelevant.

(i) Threats of imprisonment or arrest:

A marriage will be annulled where a man is threatened with a prosecution for seduction etc., or an arrest is made without probable cause and the man marries to avoid prosecution.²

In Griffiths V Griffiths,³ for example, Haugh, J, found as a fact that the husband married under duress where he was induced to go through a ceremony of marriage under the threat that he would otherwise be prosecuted for carnal knowledge of the wife, then under seventeen years of age. The threat was in fact false to the knowledge of the wife, but the husband was put in fear by it. Similarly in Hinds V Macdonald,⁴

where a sailor's desire to claim his release from

1. Shepherd V Shepherd [1917] 192 SW 658; Owings V Owings [1922] 118 A 858, and Cases cited therein.

2. See American Jurisprudence, vol.35, pp.241-45 at 244-45.

3. [1944] I.R. 35.

4 [1932] 1 D.L.R. 96

prison by marrying a woman who had had him arrested on a false bastardy charge, it was held that he gave no real consent to the marriage. Here were the double elements of the woman's threat to keep him from joining his ship and his fear of prison.

It is, however, necessary that the petitioner must prove, to establish a right to an annulment on such a ground,

- (a) that the charge was a false one; and
- (b) the defendant knew it to be false and made the charge maliciously.

(~~11~~) Threats involving mental suffering or reverential fear:

A marriage may be annulled to which consent of one of the parties was obtained by force consisting, not threats of death or grievous physical harm but, of mental suffering or reverential fear.

This proposition is supported by H V H² and Parojcic V Parojcic.³ In Parojcic V Parojcic, where the petitioner's father, after fighting with anti-communist forces in Yugoslavia left the country and came to England. The petitioner and her mother, after suffering many hardships,

1. [1932] 1 D.L.R. 96.
 2. [1953] 2 All.E.R. 1229.
 3. [1959] 1 All. E.R. 1.

left Yugoslavia after a few years, and came to England. In London they were met by the petitioner's father and the respondent, a Yugoslav refugee, whom the father introduced to the petitioner as the man whom she was to marry. The petitioner refused the proposal. There were quarrels between the father and the petitioner concerning the proposed marriage. The father threatened to send the petitioner back to Yugoslavia if she did not marry the respondent (whether he could have done so or not, both of them believed it was possible, and the threat, not unnaturally, after the past experience terrified the petitioner). Later the petitioner went through a ceremony of marriage at a registrar's office. The court on petition for nullity on the ground of mistake and duress held that a decree of nullity would be granted because the petitioner had established that she never consented to the marriage, but was driven to go through the ceremony by terror installed in her by the father's threats. Davies, J, approving Scott V Sebright,¹ observed that,

²"there is no doubt that this young woman was terrified into obedience by her father who was almost a stranger to her after years of separation and who may well have imbued with ideas of patria potestas which were fundamentally foreign to his daughter".

1. [1887] 12 PD 21.

2. Parojcic V Parojcic [1959] 1 All. E.R. 1 at 6.

Parojcic V Parojcic, it is submitted, may be applied and followed by the Courts to a case under the HMA because of the following reasons. In India a great number of parents believe in the idea of patria potestas and try to coerce their children into marriage to which they would not have otherwise consented.

Similarly in H V H,¹ an extraordinary decision which extends the doctrine of duress in England from fear of a particular person to fear of unknown persons² and the danger which it sought to avoid might be described as an extraneous one,³ the court annulled the marriage where a Hungarian girl of eighteen years in order to leave the country by obtaining a foreign passport she went through a form of marriage with a cousin, a French national, and both were living in Hungary (the parties never lived together and the marriage was never consummated.) The girl, having obtained the French passport, left Hungary and came to England where she had resided since. She petitioned for a decree of nullity on the ground that she was induced to be a party to the marriage ceremony by fear or duress. She

1. [1953] 2 All. E.R. 1229

2. William Lacey: "Recent Problems in Nullity of Marriage". [1954] 3 I.C.L.Q, pp.341-348 at pp.345-346. See also A note on H V H in [1954] 70 L.Q.R. pp.309-10.

3. See H V H [1953] 2 All. E.R. 1229.

stated in evidence that she was most anxious to leave Hungary because, "the time ^{was} ~~of~~ so terrible I was afraid of Hungary because, "the time ~~of~~ so terrible I was afraid of ^{riage} a communist government ruled Hungary and the wife came of a family which, owing to its financial and social position, might not be sympathetically regarded by such a government. The Attorney-General urged that on the facts of the marriage could not be said to have been performed under fear or duress, and that a mental reservation as to a vital condition of marriage did not invalidate it. Karminski, J, held that the fear entertained by the petitioner was of such a kind as to negative her consent to the marriage and, therefore, there was no consent.

The question is: whether the decision in H V H is correct because the marriage, it appears, was in fact a fraud practised on the Hungarian law and apparently there was no force such as would oblige her to marry and the cases¹

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1. Brodie V Brodie [1917] ⁸p.271, where Horridge, J, held that an agreement entered into by the parties before marriage to live apart thereafter was illegal and void. But it was not argued, or suggested, that because of such a reservation by the parties the marriage was itself void or voidable. On the contrary, the learned judge, affirmed the validity of the marriage by a decree of restitution of conjugal rights.
Martens V Martens [1952] 3 S.A.L.R. 771, cited in H V H [1953] 2 All.E.R. 1229 at 1233, where it was held that the marriage between a Greek woman and a man resident in South Africa was a valid one, even though the ceremony of marriage was performed so as to enable her to live with a married man in South Africa, and she deserted her husband immediately after the ceremony.

cited in H V H go against the decision arrived at.

H V H, it is submitted, is rightly decided for the following reasons:-

(i) The fear in H V H, may consist, as we have seen (p.27⁶ above) of a threat of less serious harm or fear of some untoward circumstance happening and it would be in the interest of society not to allow such marriages to be recognised as lawful.

(a) It has been suggested that,¹"under English law the only purpose which will be taken into consideration in determining whether the apparent consent can be negatived must be a purpose to avoid a danger which would be regarded as duress if threatened by the other party to the marriage. Such an interpretation avoids any risk that marriages of convenience will be unduly encouraged".

(u) Degree of Force

The question is: what is the test to be applied in cases of 'force'? Must it be sufficient to overcome the will of a reasonable man or the individual concerned?

The test should be, it is submitted, the reaction of the particular individual concerned, for some persons

1. William Latey: "Recent Problems in Nullity of Marriage" [1954] 31. C.L.Q, pp.341-348 at 346.

may have a lower resistance to fear and threats than others as Hugh, J, explained in Griffiths V Griffiths,¹

"Duress must be a question of degree, and may begin from a gentle form of pressure, to physical violence, accompanied by threats of death". Karminski, J, in H V H, agreeing with Hugh, J, 's view added that, "...² the question of degree is a question of fact for the Court. In Aukamma V Bamanappa,³ for example, although there were no threats of grievous bodily harm, the Court held "the mere fact that somebody else caught hold of his hand and made him tie a thali round the lady's neck" preceded by the fact that the petitioner was compelled by some of the people present to sit on the plank, ought not to constitute a marriage. The learned judge observed that,

"... if the husband never intended to go through the form which he is compelled to go through as a kind of automaton, he cannot be held to have gone through the marriage at all i.e. it constituted force. Butt, J, summed up the position, in Scott V Sebright,⁴ in the following words,

"It has sometimes been said that in order to avoid

1. [1944] I.R. 35 at p.42.

2. [1953] 2 All. E.R. 1229.

3. A.I.R. 1937 Mad. 332 at pp.334-335.

4. [1987] 128 D 21 at 24.

a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that this is an accurate statement of the law, whenever from natural weakness of intellect or from fear - reasonably entertained or not - either party is actually in a state of mental incompetence to resist pressure improperly brought to bear there is no more consent than in case of a person of stronger intellect and courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in the application to the facts of each individual case".

(S) "... The inducing Cause..."

The general rule is that a decree of nullity will not be granted where the petitioner had sufficient opportunity, between the time of the threats and the time of the marriage, to overcome or escape the threats, i.e. by consulting the police, friends etc., and he did not do so.¹

In Capossa V Callona,² for example, a decree of nullity was refused where the defendant husband had told the plaintiff that if she did not marry him he would kill

1. American Jurisprudence vol.35, pp.241-45 at 242-43.
See also American Jurisprudence 2d vol.4, pp.254-58 at 254-55.

2. [1923] 122 A 378.

her brother. She was permitted to go home and remain overnight. The next morning she went to New York to be married. The Court held that she had time overnight to warn her brother so that he might have a chance to leave town or have the defendant arrested.

Similarly, in O'Reilly V O'Reilly,¹ where the plaintiff left the defendant's home the evening before the marriage and when he was called on the telephone the next morning and informed that the ceremony could take place that day he readily agreed, the Court reversed a decree of nullity because, as observed by the Court, after plaintiff left defendant's home the evening before the marriage he had an opportunity to consult with friends or an attorney if he so desired.

III. Fraud:

(1) Definitions of Fraud and their applicability:

What sort of fraud is required to annul a marriage? We do not find any definition of fraud which might be satisfactory for our purposes and we must explore the different possibilities.

1. [1931] 234 N.W. at 216.

(i) Dictionary Meaning:

The word fraud has been defined as a "criminal deception; using false representations to obtain an unjust advantage or to injure the rights or interests of another".
 "An act or instance of deception; a dishonest trick."¹

(ii) Fraud in Criminal Law:

"Fraudulently" has been defined² as "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

(iii) Fraud in Contract:

According to Section 17 of Indian Contract Act fraud means and includes any of the following acts committed by a party to a contract, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

- (1) the suggestion as a fact of that which is not true,
by one who does not believe it to be true;
- (2) the active concealment of a fact by one having
knowledge or belief of the fact;

1. Murray: A New English Dictionary, vol. 4 p 516
 2. S.25 Indian Penal Code, 1860.

- (3) A promise made without any intention of performing;
or
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specifically
declares to be fraudulent.

Explanations:- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

(2) "Fraud" in "nullity":

The question is: whether fraud as has been defined in the Indian Contract Act will suffice to entitle the petitioner to petition for a decree of "nullity". Mr. Gupte¹ has expressed the view "that the word fraud used in this clause will have more or less the same meaning as given in S.17 of the [Indian] Contract Act. This view, it is submitted, is not correct because the marriage is

1. S.V. Gupte, Hindu Law of Marriage, p.187.

not a mere contract¹ but an institution of society which has some peculiarities in its nature, character and operation different from those belonging to ordinary contracts and cannot be annulled by the parties but only by the sovereign.² It was observed by Sulaiman, J, in Mt. Titli V Alfred Robert Jones,³ that a marriage is not like a mere civil contract which may be voidable at the option of one party on grounds mentioned in the Contract Act. This view finds support from Wells V Talham⁴ where the Court was of the opinion that the word "fraud" in statutes permitting annulment of marriage for that cause has not the meaning usually understood in its application to contracts generally. In this case a Protestant married a Catholic by falsely representing that she had never been divorced. The Court refusing a decree of nullity held that this representation was not fraud going to the essence of the marriage.

A distinction has been made, to establish the

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1. Harbhajan Singh V Mt. Brijbalab Kaur, A.I.R. 1964 PU 359 at p.362 (discussed below p.) K Shitesh V Emperor A.I.R. 1937 Calcutta 214 at p.217; B. Aukamma V B. Bamanappa A.I.R. 1937 Mad. 332 at 339; Ram Harakh V Jagarnath; J. Jackson: The Formation and Annulment of Marriage, p.185;
 2. Munishwar Dutt V Indra Kumari, A.I.R. 1963 PU 449.
 3. A.I.R. 1934 All.273 at p.287.
 4. [123] 33 ALR 27

meaning of "fraud", between unconsummated and consummated marriages. Admittedly it has been held that if the marriage is unconsummated any fraud which would be sufficient to annul a contract might be sufficient to annul a marriage, but in a case where the marriage has been consummated, not every kind of fraud that suffices for annulling an ordinary contract will be sufficient to annul such a marriage.¹ Such an opinion deserves consideration.

This view appears to be based on the ground that an unconsummated marriage is so inchoate and incomplete that the status of the parties is similar to that of parties to an executory contract and may be annulled without violating any considerations of public policy. Since it is little more than an engagement to marry and public concern is diminished.²

It is submitted that this view is not correct for the following reasons, namely,

(i) The general rule that an unconsummated marriage will be annulled more readily for fraud than a consummated marriage has been under consideration in cases involving

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1. B. Sivaramayyar "Annulment for Fraud", p.11. Paper read in All India Seminar on Hindu Law, University of Rajasthan.
 2. Nocenti V Ruberti [1933] 3 A2d 129. See also Watkins V Watkins 189 NYS 860; Di Lorenzo V Di Lorenzo 75 NYS 878, Svenson V Svenson 178 NY 54, Ysern V Horter 110 A31 all cited in Nocenti's case.

a fraudulent misrepresentation as to the respondent's intention to procure a subsequent religious ceremony without which the wife would not have consented to the civil ceremony, as was the case in Nocenti V. Ruberti¹ and Akrep V. Akrep.² In both the cases the marriage was annulled because the Court considered as material a misrepresentation of the husband as to his intention with reference to ^{a subsequent religious ceremony} ~~the fact that the marriage was not consummated.~~

(ii) It is not desirable to compare an unconsummated and a consummated marriage with the position of persons who have made an executory contract and the same persons after the contract is executed because a properly solemnized marriage is something more than a contract.³ A Hindu

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1. [1933] 3 A 2d 129. A man, as inducement for woman to enter into civil ceremony, promised to go through ceremony according to rites of the Church of which both were communicants. He subsequently refused to do so. The Court annulling the marriage found that the petitioner wife would not have consented to marry the defendant had she known that the representation as to the religious ceremony to follow is untrue.
 2. [1944] 63 A2d 253. A wife was induced to consent to civil marriage ceremony on husband's promise, which the husband did not intend to keep, to have religious ceremony in two months according to rites of the Church to which the wife belonged. It was proved that the defendant was, "determined before marriage not to go through with ceremonial marriage." The Court held that the wife was entitled to a decree of nullity on the ground of fraud.
 3. See above p. 289

marriage is generally binding whether or not "consummated"¹ and is a change of status which affects the spouses themselves and the whole community, and

(iii) In deciding a case the fact of consummation or non-consummation of marriage is irrelevant because what is sufficient fraud is determined in each case merely upon whether it fulfils the test laid down for fraud.

(3) Definition of Fraud:

The "fraud" for our purposes may be defined as a deliberate act of deception and/or dishonesty including a concealment or misrepresentation of an existing material fact or facts in any way relating to the essence of the marriage, and actually inducing that marriage.

(4) Test of Fraud:

The question is whether any dishonest concealment or representation relating to the marriage, inducing an intending spouse or a guardian in marriage, will be a sufficient ground for annulling a marriage?

We have seen that "fraud" in relation to a Hindu

1. J.D.H. Derrett: Hindu Law Past and Present, p.87.

marriage is not used in a general way. Public policy requires that on mere allegation of any dishonest concealment or representation a marriage cannot be allowed to be annulled. If it is so allowed then all sorts of concealments and misrepresentations will be alleged by the petitioners and it would be impossible to maintain the sanctity of marriage. It appears that, unfortunately, no test has been laid down by Jackson,¹ Gupte,² Deolalkar³ etc. However, the test laid down by Prof. J.D.M. Derrett⁴ seems to be appropriate: "Did the [concealment or the] misrepresentation go to the root of the marriage?"

(5) Cases where Acts were held to be or not to be Fraudulent:

We shall now consider, in order to substantiate the above definition, cases where acts were held to be, or not to be fraudulent, and attempt to derive a generalisation from them.

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1. Jackson, The Formation and Annulment of Marriage, p.
 2. Gupte, Hindu Marriage Act, p. 146-7.
 3. Deolalkar, The Hindu Marriage Act 1955, pp. 98-99
See also Mulla, Principles of Hindu Law, pp. 846-7
Shiv Gopal, The Hindu Code, p. 345-6 T.P. Gopalkrishna,
The Hindu Code, p. 167 T.P. Gopalkrishna, Hindu Marriage Law, pp. 137-8 N.R. Baghavachariar, Hindu Law, p. 925-30
 4. J.D.M. Derrett: Introduction to Modern Hindu Law, p. 193.

~~(a)~~(1) Concealment of an Intention not to Cohabit and not to have Children:

(a) Not to Cohabit:

A fraudulent intention by one of the spouses, prior to or at the time of the marriage, not to cohabit after marriage, if adhered to, will constitute such fraud as would justify the annulment of marriage because cohabitation after marriage is one of the essentials of marriage, and absence of such an intention goes to the "root" of the marriage.

This proposition finds support from Shireen V. Taylor,¹ where the petitioner and the respondent went through a ceremony of marriage without any intention on the part of the respondent to regard it as a real marriage.

Soni, J.² observed that, "In my opinion the respondent went through ceremony of marriage without any intention of getting married. He at that time was practising fraud on the petitioner. She would never have given her free consent if she had known that he was going to utilize her for a temporary makeshift sexual relationship." The

1. A.I.R. 1952 PU 277.

2. *ibid* at p.279; for comments on the case see J.D.M. Derrett: Aspects of Matrimonial Causes in Modern Hindu Law [1964] Revue du sud-est asiatique, pp.233-241 at pp. 237-238. *Revue*

Court held that the consent of the petitioner was obtained by fraud and that this marriage was a mere pretence and was null and void.

The American cases on the question are conflicting. There are cases on the one hand, holding that a person is not guilty of fraud (i.e. the marriage is not to be avoided) where he or she conceals an intention never to live with the other after marriage, goes through the marriage ceremony with an ulterior motive and with design, afterwards executed, of deserting the other spouse as soon as the marriage was performed, e.g. a man proposed marriage professedly for love but really to get release from confinement on bastardy process which has been sued out by the woman,¹ or the man entered into the marriage to prevent the woman from appearing against him in a prosecution for seduction.² On the other hand, it has been held that such a person is guilty of fraud and the defrauded party is entitled to a decree of nullity,³ e.g. where a woman married to obtain the man's

1. Johnson V Johnson, 176 Ala.446 cited in American Jurisprudence 2d, vol.4, at p.462.

2. Gould V Gould, 61A 604, *ibid*.

3. Florio V Florio [1955] 143 NYS 2d 105; Zerk V Zerk [1950] 28 ALR 2d 495; Wiley V Wiley [1943] 139 P2d 950 where the husband was sterilized at the wife's request prior to the marriage).

name for her illegitimate child¹ or where the woman married the plaintiff solely to gain financial advantage.²

It is submitted that the former view (based upon a local and perhaps fugitive view of public policy) is incorrect and should not be followed and the latter view is correct because

- (a) in such a case the party defrauded had no notice of such an intention and contemplated a normal marriage relationship, and
- (b) there is an analogy with the rule that a promise made without any intention of performing it constitutes "actual fraud".³

(~~1a~~) Not to have Children:

The unilateral desire to practise birth control is apt to give rise to problems concerning the rights of spouses inter se. In England and the United States of America serious legal questions have arisen where the desire to avoid the procreation of children is unilateral, and contraception is practised or insisted upon by one spouse against the wishes of the other.

1. Anders V Anders [1916] 113 NE 203 Cited in Zerk V Zerk [1950] 28 ALR 2d, 495.

2. Zerk V Zerk [1950] 28 ALR 2d. 495.

3. See American jurisprudence vol.

The purpose of the present discussion is to investigate the question whether a secret intent by one of the spouses, prior to or at the time of the marriage, not to have children, if adhered to after marriage, constitutes such fraud as will entitle the defrauded party to a decree of nullity.

In England the question does not appear to have arisen directly but it may be noted that in Baxter V. Baxter,¹ while it was held that a decree of nullity would not be granted on the ground of non-consummation although contraceptives were used, in spite of the objection of the husband, Lord Jowitt L.C.² observed that, "I desire also to reserve the question what bearing the employment of force of fraud may have on the issue of consummation."

In America, although there is authority to the contrary,³ it has been held in most cases that a fraudulent concealment, prior to or at the time of marriage, by one of the spouses not to have children although promising to do so expressly or by implication⁴ and afterwards refusing

1. (HL) [1947] 2 All.E.R. 886.

2. *ibid* at p.889.

3. See American Jurisprudence 2d Vol.4 at p.452; Hannibal V Hannibal [1943] 1 A 2d. 838.

4. Schulman V Schulman [1943] 46 NYS 2d 158; Gerwitz V Gerwitz [1945] 66 NYS 2d 327; Hafner V Hafner [1946] 66 NYS 2d 442.

to engage in sexual intercourse unless contraceptives is practised, constitutes such fraud as, if not waived,¹ either by continual cohabitation (despite the knowledge that measures were being used to prevent conception or by acquiescence in the use of contraception) will entitle the defrauded party to a decree of nullity.²

It is submitted that the American view may be followed in cases under the HMA in which a decree of nullity is sought upon the same grounds for the following reasons, namely,

- (a) the concealment of an intention not to have children goes in Indian eyes to the "root of the marriage and is a promise fraudulent in purpose warranting

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1. Gerwitz V Gerwitz [1945] NYS 2d 327; Hafner V Hafner [1946] 66 NYS 2d.442; Fish V Fish [1947] 67 NYS 2d,768; Bentz V Bentz [1947] 73 NYS 2d.442; Antoni V Antoni [1954] (Misc.) 128 NYS 2d.510; Gardner V Gardner [1954] 130 NYS 2d.859; Ackerman V Ackerman 231 NYS 2d cited in A.L.R.2d. Supplement Service [1961-63] (1964 issue) at p.56; Primner V Primner 234 NYS 2d.795, *ibid.*
 2. Schulman V Schulman [1943] 46 NYS 2d.158; Gerwitz V Gerwitz [1945] 66 NYS 2d.442; Hafner V Hafner [1946] 66 NYS 2d.442; Bhok V Bhok [1946] 63 NYS 2d.401; Berger V Berger [1947] 73 NYS 2d.384; Richardson V Richardson [1951] 103 NYS 2d.219; Pisciotta V Pisciotta [1954] 91.A.2d.629. Florio V Florio [1955] 143 NYS 2d 105; Zogolio V Zogolio 157 A 2d. cited in [1965] A.L.R. 2d later case service at p.332; Pisciotta V Buccivo 91 A 2d 629 *ibid* (in which, however, evidence was held insufficient to establish fraud).

a decree of nullity because the primary aim of marriage is the procreation of children. Where the spouses enter into the marriage, it is presumed that they intend to do so with all the usual implications including a willingness to have children, and

- (b) there are, however, considerations of health, or race, or even the public consideration of over-population, which will justify an agreement or understanding between the parties that they shall practise contraception. What is under consideration here is a concealment of an intention on the part of one spouse not to cohabit without contraceptives.

(iii) Concealment of Sterility and Physical Incapacity:

A concealment of known sterility by either spouse, prior to marriage, unless waived, may be such fraud as to justify a decree of nullity.

The proposition is supported by Turney V. Avery¹ and Aufort V. Aufort². In both the cases a decree of nullity was given to the husband on the ground of fraud where the

1. [1921] 113A 710.

2. [1935] 49 P 2d 620.

woman did not divulge that she had been surgically sterilized for "... the procreation of children is one of the ends of marriage".¹ It is submitted that if one of the spouses enters into the marriage knowing that he or she is incapable of sexual intercourse and conceals the fact from the other spouse, it will be a ground for nullity on the ground of fraud irrespective of any relief under Section 12(1) of HMA.

(iv) Concealment of disease:

A concealment of an incurable disease, including hereditary insanity, affecting the health and well-being of the spouses and their offspring, is fraud sufficient to warrant a decree of nullity.

The proposition finds support from Indian as well as American cases.

In Birendra Kumar V Hemlata Biswas² the petitioner, B, asked that his marriage with the respondent, H, may be declared null and void, on ground that the respondent had

1. Turney V Avery at p.711.

See also American Jurisprudence 2d. Vol.4 at p.451.

Fowler V Harper, Problems of the Family, p.175.

2. A.I.R. 1921 Cal. 459 (before remand).

been suffering from a loathsome disease of syphilitic origin alleged to incurable and the petitioner alleged that the marriage was brought about fraudulently and that all the information with regard to the disease was concealed from him. Mookerjee, A.C.J., remanding the case for further investigation of the alleged fraud, observed that¹ "Concealment of a loathsome and incurable form of syphilis is recognised as fraud sufficient to warrant divorce or annulment." On remand² the case was heard by Greaves, J, who found upon evidence that the father of the respondent knew prior to the marriage that the respondent was suffering from syphilis, and that this fact was not known to the petitioner but was concealed from him. The learned judge, assuming that the father knew that the disease was incurable, did not think³ "that this would be a good ground for annulling the marriage". It is submitted that the observations of Mookerjee, A.C.J., were a correct exposition of law because a person afflicted with a grievous incurable and contagious disease is a source of hidden danger and when a marriage is performed concealing such a disease the diseased spouse threatens the other spouse with infection and their

1. A.I.R. 1921 Cal. 459 (before remand).

2. A.I.R. 1921 Cal. 464 (after remand).

3. *ibid* at p. 465

children with hereditary disease. In such circumstances, on the considerations of public policy, a case exists for state interference by way of judicial annulment.

A recent case on the question is Ananth Nath V. Lajjabati,¹ where it was alleged that the consent of the petitioner was obtained by fraudulent representation as to the respondent's health. It was represented that the respondent was of sound health whereas in fact she was suffering from tuberculosis. The Court held that concealment of a disease does not avoid a marriage. In this case the decision is right because the disease was curable but it is submitted that the Court took a narrow view on the subject when it observed that,² "...concealment of a disease other than those mentioned in the said section [S.13(iii) (iv) & HMA] can not be the foundation for avoiding the marriage", because it failed to consider the effect of a distinction between a curable and incurable disease, a disease going to the "root" of the marriage, such as syphilis, and a disease which does not directly relate to the purposes of marriage.

1. A.I.R. 1959 Cal. 778. See as to the comments on the case, J.D.M. Derrett: [1964] Revue du sud-est asiatique at p.239.

2. *ibid* at p.780.

In American cases a fraudulent concealment of tuberculosis, hereditary insanity and venereal disease has been generally held to be a ground for nullity on the ground of fraud. In Bernice Leventhal V Fennie Liberman,¹ the marriage was annulled because of husband's and his parent's fraud in procuring the consent of the wife to the marriage. The father and the sister of the respondent were both specifically asked, before the marriage, regarding the health of the young man. They both assured the plaintiff and her family that the respondent had never been sick, whereas, in fact, they both knew that he was tubercular and had been treated for the disease. In Davis V Davis² and Sobol V Sobol,³ the Court gave a decree of nullity to the wife, where the husband was suffering from tuberculosis, emphasizing dangers to the health of the wife and her offspring. We find, as to the concealment of venereal disease, that generally if either spouse conceals from the other that he or she is afflicted with an incurable chronic venereal disease, it is deemed to be such a fraud as will warrant a decree of nullity.⁴

1. [1933] 88 A.L.R. 782.

2. [1919] 106 A 644.

3. [1914] 150 NYS. 248.

4. C V C [1914] 5.A.L.R. 1013 and cases referred to therein.

(V) Misrepresentation as to premarital unchastity:

There is no warranty (even at Hindu law)¹ by either party to the marriage, of premarital chastity, and ordinarily, the misrepresentation by the wife as to the fact that she was unchaste before marriage is not fraud for which a decree of nullity may be granted. This seems to be on the ground that chastity is considered to be a personal quality and does not prevent the woman from becoming a faithful wife or from performing her part in the marriage. This view finds support from Indian, East African, English and American cases.

In Harbhajan Singh V Smt. Brijbalabkaur² where, according to the petitioner's allegation, his consent to the marriage with the respondent was obtained by the making of³ "wilful misrepresentation and fraudulent statement as

1. The ancient sastric conception that a bride must be a virgin was ignored from early in the British period and has no footing today even among the less modernised classes. Repudiation for want of virginity is virtually unheard-of, though it must have prevailed prior to the British period.

2. A.I.R. 1964 PU. 359.

3. *ibid* at p. 360

to the fact of virginity and good character of the respondent". The Court came to the conclusion that such representation is not sufficient to be a fraudulent misrepresentation. However, it appears that if the marriage was induced by the misrepresentation (i.e. where premarital chastity was expressly required see Gatto V Gatto¹ below 307) it goes to the root if the misrepresentation was fraudulent. Similarly the Kenya Supreme Court considered the question in Jayasukhlal V Lalita² where Rudd, J, observed that, "Once the nuptial ceremony was completed ... a marriage is complete which can not be avoided even if it had been the case that the bride had induced the bridegroom to marry her by representing herself to be a widow when, in fact, she had been a dancing girl, who had previously led an immoral life with several other men...".

The question is: whether sexual cohabitation before marriage can be pleaded as premarital unchastity? This was the case in Madan Setti V Thimmi Avva,³ where M raised the contention that his marriage with T was invalid because she was pregnant at the time of marriage. The lower

1. [1919] 106 A 493.

2. A.I.R. 1955 N.U.C. 1945.

3. A.I.R. 1940 Mad. 135.

appellate Court had found, as a fact, that T was pregnant at the time of her marriage by M himself. It was held that a marriage with a girl who is not a virgin is not void. Wandsworth, J,¹ observed that, "... it is going still further to say that, when a man has married a girl with due formalities, he himself having had an irregular connexion with that girl before marriage, he is entitled to repudiate the marriage on the ground of lack of virginity of the bride". It is submitted that this is an extreme case and sexual cohabitation before marriage is not a ground for annulling a marriage. In fact Hindu law has long held² the view that premarital unchastity does not avoid a marriage. However, the question remained open whether concealment of unchastity was fraud. The answer to this question, it is submitted, must depend on the facts of a particular case.

The question has never come squarely before the English Courts but it has been held that premarital unchastity can not be pleaded to set aside a marriage.³

1. A.I.R. 1a 40 Mad. 135.

2. *Mayne* 11th edn. 144.

3. Perrin V Perrin [1822] 1 Add. 1 = 162 E.R.1.
Graves V Graves [1842] 3 Curt 236 = 163 E.R.714.

In America¹ the rule is that premarital unchastity, although concealed by one of the parties (with or without conscious reference to such subjects by the parties previous to their marriage) will not constitute a ground for annulment² except under exceptional circumstances involving extraordinary fraud, or where an express warranty of premarital chastity was exacted as a condition for consent to marry (as was the case in Gatto V Gatto) and was not honoured.³ In Gatto V Gatto⁴ the Court held that the complainant was entitled to a decree of nullity on the ground of extraordinary fraud where the ~~wife~~ ^{Complainant} made the defendant's previous chastity an express condition of his promise to marry her, she understood this, and unequivocally asserted that she was a chaste and virtuous woman, which was false, and the marriage was celebrated in view of this condition, which was understood to be material, and constituted an inducement to Complainant to ~~enter into~~ ^{solemnize} the marriage.

(V). Misrepresentation as to pregnancy:

The question is: whether the misrepresentation as

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1. See American Jurisprudence, Vol.35, 261-62;
American Jurisprudence 2d, Vol.4, pp.465-66;
See also Fowler V Harper, Problems of the Family, p.176;
Vanneman, "Annulment of Marriage for Fraud", Selected Essays on Family Law, Published by the Association of American Law Schools, pp.335-53 at p.346.
 2. Security first National Bank Case [1945] 162 P2d 966;
Fox V Fox [1943] 134 P2d 29; Vileta V Vileta [1942] 128 P2d 261; Sutton V Sutton [1936] 55 P2d 261.
 3. Gambacorta V Gambacorta [1954] 136 NYS 2d 258;
Yucabezky V Yucabezky [1952] 111 NYS 2d 441;
Gatto V Gatto [1919] 106A 493.
 4. [1919] 106.A.493.

to premarital pregnancy where the husband has had premarital relations with the wife or where he marries her upon the false representation that she is pregnant by him although she is not pregnant at all, is such fraud as to annul a marriage.

(a) Where the husband has had premarital relations:

Where a woman has falsely alleged that she is pregnant as a result of her premarital relations with the husband thereby inducing him to marry her the American Courts are divided in granting relief. The Courts take the view, on the one hand, that the husband by having premarital relations with the wife assumes responsibility for the results of his intercourse with her as well as results of her intercourse with anyone else and hence a decree of nullity will not be granted.¹ On the other hand the view has been taken that such misrepresentation constitutes fraud enabling the husband to get a decree of

1. Marckley V Marckley [1945] 189 SW 2d 8; Boisclair V Boisclair [1943] 47 NE 2d 291; Westfall V Westfall [1921] 13 ALR 1428; Foss V Foss [1866] reported in Fowler V Harper, Problems of the Family, p.195.

nullity.¹ It is submitted that the latter view is correct because although a man might have been willing to marry a woman who, he supposed, was pregnant by him, few right thinking men would be willing to take as a wife a woman pregnant by another and care for, as their own, the illegitimate children of others.

(b) ... where she is not pregnant at all:

Where a woman falsely pretends that she is pregnant by the respondent thereby inducing him to marry her but she was not pregnant at all there is a fraud, it is submitted, such as will negative consent.

It is submitted that where a woman is pregnant by another man at the time of marriage (or not pregnant at all), and she misrepresents that fact to the man she marries, he is entitled to a decree of nullity under section 12(1)(c) (i.e. for fraud) irrespective of any

1. Cuneo V Cuneo [1950] - Misc- NYS 2d 899;
Statford V Statford [1949] 217 SW 2d 917;
Arudt V Arudt [1948] 82 NE 2d 908;
Yaquer V Yaquer [1946] 21 NW 2d 138;
Morris V Morris [1940] 13 A2d 603; Jackson V Rubey [1921] 19 A.L.R. 77; Winner V Winner [1920] 11 A.L.R. 919;
Gard V Gard [1918] 11 A.L.R. 923. Se also American Jurisprudence, Vol.35, pp.263-64. American Jurisprudence 2d, vol.4, pp.467-68. Fowler V Harper, Problems of the Family, at p.175; Vanneman, "Annulment of Marriage for Fraud", Selected Essays on Family Law, published by the Association of American Law Schools, pp.335-53 at pp.338-41.

relief under section 12(1)(d) on the ground of concealed pregnancy (whether or not the husband had had premarital sexual relations).

(VI). Misrepresentation as to premarital status:

A fraudulent misrepresentation as to the prior marital status inducing a spouse (or a guardian in marriage) to give consent to the marriage is not such fraud as might avoid a marriage because, (a) misrepresentation, to be ground for annulling a marriage, must be with respect to a matter which is an essential of the marriage relation and (b) the past marital history of a person who is presently competent, both legally and physically, to marry and perform all of his or her marital duties is not such a matter.

We will now consider Indian and a few American cases on the point in order to substantiate the proposition.

In India, while the premarital status of the bride is of the greatest importance in all castes, it is only in some castes that the status of the bridegroom is closely regarded. However few families of equal wealth and caste status care to give their daughters to be second wives or to a husband who is cohabiting with a concubine.

Rukmani V T.S.R. Chari¹ is an example in support of this proposition. This was a suit for restitution of conjugal rights by the husband, H. The wife, W, alleged that H married her after making a false representation that he was a bachelor. It was admitted by H afterwards that he had married a distant relation of his several years ago, and that later on, he went through a Sambandham with a Nair girl (i.e., he would not have been legally competent under HMA to marry). There was evidence to the effect that the marriage would not have been gone through if H had been known to be not a bachelor. In the High Court, on appeal, the fact that H, by means of false statement that he is a bachelor, was able to induce the guardian of W to marry her to him, was considered very serious. It was held that equitable relief sought in this case is not to be granted to a person who has himself been guilty of fraud and acquired his right to apply for it by means of such fraud. It is submitted that had nullity been asked for by a wife, under HMA, in such a case the position might have been otherwise, i.e. the grounds for nullity were present, since the husband was not legally competent to marry under HMA.

1. A.I.R. 1935 Mad. 616

In America there is a conflict of authority as to this question. Most cases are in accord in holding that the fact that one who marries merely "conceals from" his or her spouse the fact that a previous marriage has been dissolved by divorce, is not a ground for the annulment of marriage,¹ i.e. these cases support our proposition. In Cassin V Cassin² the Court was of the opinion that false representations by a woman, about to be converted to the Roman Catholic faith and be married under its laws, that she had not been divorced, when a former husband is living, while making the marriage void under the laws of the Church, is not of the essentials of the marriage so as to entitle the husband to have the marriage annulled. Similarly, in Wells V Talham³ and Irena V Thomas,⁴ a marriage between members of a religious denomination which forbids the marriage of divorced persons it was held will not be annulled, where one of the parties fraudulently represented that he or she had not been divorced because such representations do not touch the essence of the marriage.

1. American Jurisprudence 2d, Vol.4, pp.451-2. See also Vanneman "Annulment of Marriage for Fraud", Selected Essays on Family Law, published by the Association of American Law Schools, pp.335-53 at pp.343-44.

2. [1928] 58 A.L.R. 319.

3. [1923] 33 A.L.R. 827.

4. [1922] 23 A.L.R. 178.

(viii). Misrepresentations as to caste and religion:

Whereas, even in India, the concealment of portions of the respondent's premarital history might not be, and it is submitted, is not such fraud as will go to the root of the marriage, the concealment of legitimacy and/or caste status may be an altogether different matter. Matrimonial alliance with a person of inferior caste may result in excommunication (where this is still legal) or in other social penalties. The offspring of marriages of mixed castes, though legally not subject to disabilities are still, in many communities, considered inferior and even tainted. Marriage is for a home and there can be no home where caste or religion have been fundamentally misrepresented.

It is submitted that a misrepresentation by one of the spouses, which would mislead a reasonable person as to caste or religion, thereby inducing the other to marry may constitute sufficient fraud to annul a marriage. We find support for our proposition from Indian as well as American cases.

(a) Caste:

Bimlabai V Shankerlal,¹ a case of doubtful authority since the HMA had already been passed, where the father of the bridegroom concealed from the family of the bride, the fact that the latter was not a legitimate son of the same caste. The misrepresentation was aggravated by the representations continued at the very ceremony of marriage itself. The Court held that the consent of the bride and her guardian was vitiated by this misrepresentation. The actual decision was vitiated² by certain considerations not material to this discussion. But the grounds for nullity were, it is submitted, present in the case. Similarly, in Kshitesh V Emperor³ a marriage was sought to be invalidated where the marriage was solemnized because of a misrepresentation as to subcaste. It was held that there is no rule of Hindu law which prevents a man and woman belonging to two

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1. A.I.R. 1959 M.P. 8. As to the criticism of the case see J.D.M. Derrett: 61 Bom. L.R. (J) 82-7; see also J.D.M. Derrett: "Aspects of Matrimonial Causes in Modern Hindu Law" [1964] *Revue du sud-est asiatique*, p.239. J.D.M. Derrett: Introduction to Modern Hindu Law, pp.193-194.
 2. (a) The grievance developed after a long time and the petition was presented perhaps because of family intrigues; and
(b) The petition was presented, it appears, after a delay longer than allowed under HMA.
 3. A.I.R. 1937 Cal. 214.

subcastes from entering into a lawful marriage. However, Mukherji, J,¹ did not express any opinion as to the question: Whether the fact that the mother's consent was processed by misrepresentation would be sufficient to render the marriage null and void". It is submitted that in principle it would have been sufficient.

(b) As to religion:

In Claudia Jude V Lancelot Jude² the plaintiff, a Roman Catholic, asked for a decree of nullity alleging that the defendant falsely represented to her that he was a Roman Catholic and persuaded her to marry him in a civil ceremony, without the knowledge of her parents, promising that they should again be married later in the Roman Catholic Church. The defendant did not keep his promise and persuaded the plaintiff to live with him. The marriage was not consummated. Later she came to know that the defendant was a Jew and not a Roman Catholic. The Court granting a nullity decree held that the misrepresentation as to his religion, in view of the fact that marriage with him was in fact forbidden by her own personal law, was such fraud as to render her consent to the marriage invalid, i.e.,

1. A.I.R. 1937 Cal. 214 at 218.

2. A.I.R. 1949 Cal. 503.

the misrepresentation went to the essentials of marriage. Similarly, in Aykut V Aykut¹ the marriage was annulled on the ground of fraud, where the petitioner, a Roman Catholic, married a Turk who falsely represented to her that he was a Roman Catholic.

In America misrepresentation concerning religion involving a false representation or a false promise as to the performance of a religious marriage ceremony preceded by a civil marriage ceremony² (as was the case in Jude V Jude) which would mislead an ordinarily prudent person, has been held to constitute fraud.

A serious question arises in India at Hindu law if a Sikh induces a Hindu to marry him by pretending to be a Hindu, or a Jain or Buddhist pretends likewise with a

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1. A.I.R. 1940 Cal.75 (The petitioner stated that she would never have married him had she known that he was a Mahomedan and that she did not have sexual intercourse with the respondent after she discovered that he was in fact a Mahomedan. The Court granting a decree of nullity observed that the policy of the Act [Indian Divorce Act 1869] does not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous.
 2. See American Jurisprudence, Vol.35 at p.240. See also American Jurisprudence 2d, Vol.4 at p.452. Vanneman "Annulment of Marriage for Fraud", Selected Essays on Family Law, published by The Association of American Law Schools, pp.335-353 at p.347.

similar effect. These religions are not identical and difference of religion can lead to great inconvenience or unhappiness. But public policy seeks to treat all Indians not Christians or Muslims as belonging to one community. It is submitted nevertheless that in the cases enumerated here the misrepresentations would go to the root of the marriage.

(viii). Misrepresentation as to personal qualities:

A misrepresentation as to character, rank, family, fortune, morality, temper and habits is no ground for nullity because there are personal qualities whose absence does not go to the essentials of the marriage.

The matter arose for decision in Wakefield V Mackay¹ "where it was held that fraud as to the spouse's character, fortune, family is no ground for setting a marriage aside, for such are accidentals and not the essentials of the marriage. The position was made clear by Sir William Scott when he said,²

1. [1807] 1 Phill. ECC. 134 (note) = 161 E.R. 937.

2. ibid at 137 (note) = at p.939. See also American Jurisprudence, Vol.35, p.238; American Jurisprudence 2d, Vol.4, p.450; Fowler V Harper, Problems of the Family, p.176; Vanneman, "Annulment of Marriage for Fraud", Selected Essays on Family Law, published by the Association of American Law Schools, pp.335-53 at pp.342-43.

"A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity however it may have been produced". This applies a fortiori to India where marriages are so often negotiated by relations and are the result of prolonged investigations and even bargaining.

(6) Conclusion:

We find that fraudulent concealment and/or misrepresentation in the following regards, relied upon by the petitioner and actually inducing him to consent to the marriage, may usually be held to be fraud going to the "essence" of the marriage and hence will be sufficient ground for annulling a marriage: concealment of:- an intention not to cohabit and not to have children, sterility and physical incapacity, incurable disease affecting health and well-being of the spouses and their children; misrepresentation as to:- premarital pregnancy, caste and religion. A decree of nullity, however, will usually be denied for misrepresentations as to premarital unchastity, premarital status, as to personal qualities, including character, rank, family reputation, fortune, temper, habits and property.

(7) Factors Limiting jurisdiction:

The Court shall refuse to entertain a petition for annulling a marriage on the ground of force or fraud where either

(i) the petition was presented after the expiration of time prescribed for its presentation, i.e., if the petition is presented more than one year after the force had ceased to operate or as the case may be, the fraud had been discovered;¹ or

(ii) the marriage has been approbated by the petitioner by living with the other party to the marriage, with his or her full consent, as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered,² (as to approbation generally see under impotence).

The question ~~that~~ when the force had ceased to operate or, as the case may be, the fraud had been discovered is a question of fact to be determined in each case.

IV. Force and fraud in Kenya and Uganda:

In Kenya and Uganda, in attempting to answer as to what constitutes force or fraud and when it will suffice to

1. S.12(2)(a)(i) HMA.

2. S.12(2)(a)(ii) HMA.

entitle the petitioner for a decree of nullity, the English law on the subject is to be applied, where the consent of either party is obtained by force or fraud.¹ Similarly, the English law is to be applied, in Kenya only, when the consent of the guardian in marriage is so obtained. However, we do not find any indication as to what law should be applied in a similar case under Uganda Ordinance.²

It appears that,

(1) The definition of force laid down and general principles discussed above on the basis of English law, it is submitted, are equally applicable to a case under Kenya and Uganda Ordinance;

(2) In English law a decree of nullity will only be granted where the fraud negatives consent to marry the human being to whom the petitioner was married. The error must be as to the 'identity' of the person and not, 'fortune', or 'condition', or 'quality'.³ However, as we have seen, there may be other instances of fraud. What then is a judge to do? It is submitted that in such a case, the definition, test and general principles of fraud applicable to a case under HMA may be applied to a case under Kenya and Uganda Ordinance.

1. Cap 157 11(1)(b)(iii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; Cap.112 S13(1)(e).
2. S9(3)(c) [The Uganda] Hindu Marriage and Divorce Ordinance, 1961.
3. See J.Jackson, The Formation and Annulment of Marriage, pp.203-5. J.D.M. Derrett, Introduction to Modern Hindu Law, pp.193-4.

CHAPTER VII

CONCEALED-PREGNANCY AT THE TIME OF THE MARRIAGE

I Introduction:

A marriage may be annulled by a decree of nullity on the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner.¹

These provisions appear to have been based upon the [English] Matrimonial Causes Act, 1950,² section 8(1)(d) reenacting section 7(1)(d) of the Matrimonial Causes Act, 1937.

II Preliminary requirements:

The petitioner has to "satisfy" the Court, in order to obtain the relief, on the following matters:

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1. S.12(1)d H.MA; Cap 157, S.11(b)(v) The [Kenya] Hindu Marriage and Divorce Ordinance 1960.
 2. "that the respondent was at the time of the marriage pregnant by some person other than the petitioner".
As to concealed pregnancy generally see: S.V.Gupte, Hindu Law of Marriage, pp.188-90; P.V.Deolalkar, Hindu Marriage Act, 1955, pp.101-3; Shiv Gopal, The Hindu Code pp.346-7; N.R. Raghavachariar, Hindu Law, Principles and Precedents, pp.930-31; J.D.M.Derrett, Introduction to Modern Hindu Law, pp.194-95. T.P. Gopalkrishna, etc.; Codified Hindu Law, pp.168-70; T.P. Gopalkrishna, Hindu Marriage Law, p.138; D.F. Mulla, Principles of Hindu Law, p.847; A.G.Roy, Hindu Law (Past and Present), p.102; D.H. Chaudhury, Hindu Marriage Act, 1955, pp.212-15; Dr. Gyan Prakash, The Hindu Code, pp.313-314. See also: J.Jackson, The Formation and Annulment of Marriage, pp.205-6.

- (1) that at the time of the marriage he was "ignorant" of the facts alleged;¹
- (2) that proceedings have been instituted in the case of a marriage solemnized before the commencement of the Act [or the Ordinance] within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage;² and
- (3) that marital intercourse with his consent has not taken place since the discovery, by him, of the existence of the grounds³ for a decree.⁴

(1) ... "ignorant" of the facts alleged:

This clause proceeds on an assumption of the facts alleged being capable of proof, namely and principally pregnancy which must itself involve the assumption of the wife having had connection with some male person. The petitioner has to prove, to obtain relief under this clause, two things, namely,

- (i) that he was ignorant at the time of the marriage

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- 1. S.12(2)(b)(1)(i) HMA; Cap.157, S.11(b)(v)(i) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.8(1)(i) of the MCA, 1950.
 - 2. S.12(2)(b)(i)(ii) HMA; Cap.157, S.11(b)(ii)(ii). The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.8(1)(ii) of the MCA, 1950.
 - 3. The use of "grounds" instead of ground is an example of bad draftsmanship for here the ground mentioned is only one i.e., concealed-pregnancy. This mistake arose it appears, due to indiscriminate copying of S.8(1)(iii) of MCA, 1950.
 - 4. S.12(2)(b)(i)(ii) HMA; Cap.157, S.11(b)(v)(ii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960; S.8(1)(iii) of the MCA, 1950.

of the fact that the respondent was pregnant; and

(ii) that he was ignorant of the fact that he was not the person responsible for her pregnancy because in such a case there is a negative obligation,¹ on the petitioner, of proving that that person, with whom the respondent had had connection was not himself (as to standard of proof see below p.).

The policy of this preliminary requirement is not self evident. Presumably the intention was to reject, as "insincere", petitions grounded on facts, the knowledge of which could have existed in the petitioner's mind when he married the respondent, so that marriage seemed to condone the facts.

The question is: what does "ignorant" mean? Does it mean that the petitioner should have had certain knowledge of the facts alleged? or does it mean that the situation should be such as to make him suspicious and put him on enquiry?

The expression "ignorant" is not defined either in the Hindu Marriage Act, 1955, Kenya Ordinance or in Matrimonial Causes Acts 1937 or 1950, and the comparative

1. Jackson V Jackson [1939] 1 All E.R. 471. See also Sivaguru V Saroja A.I.R. 1960 Mad. 216 (where it was merely said that he [the petitioner] must show that he was ignorant of the facts upon that occasion.

dearth of express authority on the topic is not surprising. The Oxford English dictionary¹ defines it as, "destitute of knowledge, either in general or with respect to a particular fact or subject; unknowing; uninformed; unlearned." But this definition takes us no further.

Indeed, the difficulties in the way of providing a precise legal meaning of "ignorant" are stupendous. It might be thought that an obvious illustration of "ignorant" would be in a case where the respondent's behaviour, before the marriage was such as to cause the petitioner to suspect her conduct but the respondent assured him as to her conduct. But in such a case the petitioner can hardly be said to be "ignorant"² ~~of~~ ^{if} the circumstances might have been

1. Murray: A New English Dictionary vol.5, p.33.

2. See Raghavachariar: Hindu Law, Principles and Precedents, p.931, where he says: "If it is doubtful whether the pregnancy was by the petitioner or somebody else by reason of the petitioner and others having had intercourse with the respondent prior to the marriage, the benefit of doubt must be in favour of the validity of the marriage for in such circumstances it is not possible to say that the respondent was pregnant by some person other than the petitioner. Again if the circumstances proved do not clearly show that the petitioner was ignorant of the fact of the pregnancy at the time of the marriage, and it is doubtful if he knew about it or not, the burden of proof that he did not know about the pregnancy must be thrown on him, the presumption being that he did know about the pregnancy at that time."

such that the petitioner should not, as a reasonable man, have believed the respondent when she assured him as to her conduct. Similarly, if it is possible to say that the petitioner had reasonable grounds to suspect the respondent's character, but, nevertheless, decided to give her the benefit of the doubt and made no further inquiries.

It appears that an objective test must be applied. Was it plain on the facts that the circumstances would have made abundantly clear, to a reasonable man, that the respondent, before the marriage, was not beyond suspicion? Since a case under this clause involves the status of the parties public policy requires that a marriage shall not be avoided lightly. But, at the same time, it will be unfair to expect the petitioner to be able to show absence of a certain knowledge of the pregnancy. Of his own dealings with the respondent he can of course, be expected to have certain knowledge (leaving for the present the problem of the mentally defective petitioner).

A precise definition of "ignorant" would be highly technical. But, basically, it means that in the circumstances of the case the petitioner, as a reasonable man, was not aware at the time of the marriage of the fact that the respondent was pregnant.

It must be remembered that the proviso has other implications in India from those it has in England. In India betrothed couples seldom personally approve each other, or maintain daily or frequent contact prior to the marriage. The intended bridegroom has few or no opportunities to observe his intended spouse's waistline. Moreover, even if he had such opportunities, the folds of the sari will conceal the early stages of pregnancy very efficiently. The bridegroom's means of knowledge are in the majority of cases confined to inquisitive and persistent female relations and it is left in practice to them to awaken in him suspicions of fraud. But since the marriage is in any case the work and contrivance of relatives this inquisitiveness may be stifled or it may fail for a variety of other reasons.

- (2) that proceedings have been instituted ... within one year ... of such commencement ... from the date of the marriage...

It appears, on one reading of the clause, that the petitioner is barred from petitioning for nullity, where the petition was presented after the expiration of time prescribed for its presentation. Can this period be extended? Suppose the petitioner's right to petition for nullity has

been concealed by the fraud of the respondent (e.g., (i) by the bride's withdrawal during the remainder of the pregnancy, and bringing the child to birth secretly, and secretly conveying the child away to persons in collusion with her or her parents, or (ii) where the husband may have to go abroad and he may not become aware of the facts in question in time to enable him to take proceedings). Is the petitioner debarred from petitioning for nullity?

The case on the question is Savalram V Yeshodabai¹ where, the petition was filed on the day on which the Court opened after long vacation during which the prescribed period expired) it was held that,

"A² fair reading of the section [12(2)(b)(i)(ii)] clearly shows that it does not prescribe a period for filing a petition by the plaintiff; it is in terms mandatory and prohibitory and provides that the Court shall not entertain, the petition if the Conditions laid down therein are not satisfied. These conditions are in absolute terms and they can not be relaxed."

1. A.I.R. 1962 Bom. 190.

2. *ibid* at p.191. See also Sivguru V Saroja A.I.R. 1960 Mad. 216 (where it merely says that he [the petitioner] must institute proceedings within the period of limitation fixed by the statute.)

The only reported English case on the question is Chaplin V Chaplin,¹ where the petition was presented after the time prescribed for its presentation. The petitioner, in appeal, argued that,

"..., in effect, provisio in S.7 (1) [of MCA 1937] is in the nature of a statute of Limitation and that equitable principles should be applied to its interpretation, and, accordingly, if it be established that the husband's right in this respect has been concealed by the fraud of the wife, the period provided for in the sub-section should be extended until the discovery of fraud."²

Rejecting this argument Tucker, L.J.,³ observed that,

"... Parliament has thought fit to prescribe in the clearest possible language that the Court shall not grant a decree unless it is satisfied that proceedings were instituted within a year of the date of the marriage. It would be wrong for this Court to extend that period..."

There is a strong probability that the decision in Chaplin V Chaplin⁴ may be followed in future by the Indian Courts.

1. [1948] 2 All. E.R. 408 (C.A.).

2. *ibid* at p.411.

3. *ibid*.

4. Cited above.

The period is, it is submitted, (i) quite arbitrary and rigid, and (ii) until the section is amended, (as to the proposed amendment see below p.) absolute¹ and can not be extended, for the following reasons:-

(i) Parliament has expressly delimited the period after the expiry of which an action under this clause can not be brought. It would be wrong to extend the period in case of an allegation of fraud because,

(a) had Parliament been interested in making an exception in case of fraud it would have made S.12(2)(b)(ii) (i.e. providing for the proceedings to be instituted ... within one year) subject to S.12(2)(a)(i)² (providing for a petition to be presented, in case of force or fraud, within one year after the force had ceased to operate or, as the case may be, the fraud had been discovered). Parliament instead clearly provided in the same section (i.e. S.12(2)) a period of limitation for cases involving fraud and concealed pregnancy.

(b) There is a danger of giving effect to fanciful

1. See S.V. Gupte: Hindu Law of Marriage, p.189.

2. See below.

See also R.B. Pal: Law of Limitation at p.270. "The law of limitation having been codified here no equitable doctrine should be adopted". See also J. Jackson: Formation and Annulment of Marriage, p.187.

doubts, if one asserts what the Parliament clearly did not intend, i.e., that the period may not be absolute.

(ii) Section 9 of the [Indian] Limitation Act, 1963, excludes any possibility of application of section 17¹

1. S.17 reads as follows:

Effect of fraud or mistake.

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-

(a) the suit or application is based upon fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which..

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

continued:

of the Limitation Act when it provides that where once time has begun to run, no subsequent disability or inability to institute a suit or make an application will stop it. In case of S.12(2)(b)(ii) time begins to run, in the case of a marriage solemnized before the commencement of HMA, at one year before commencement, or, in the case of marriages solemnized after such commencement, at the date of the marriage, and, accordingly, no disability or inability to sue can stop the period of limitation running.

(3) that marital intercourse with his consent has
not taken place

Various questions arise to be considered. What do the terms "discovered" and "intercourse with the consent of

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the Court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

the petitioner mean?"

(i) Meaning of "discovered"

Does it mean that a petitioner is debarred from petitioning for nullity because he, before the marriage, had grounds for suspecting that the respondent was pregnant by someone else - subsequent events turning that suspicion into a certainty? Let us suppose that on inquiry the respondent on the one hand denies this and on the other refuses to submit to a medical examination. The marriage takes place and the petitioner has sexual intercourse with the respondent. He has shown that he was "ignorant", but his proceeding to petition is based on his "discovery". At what point does "discovery" arise? At some point, we may assume, he has imputed to him the knowledge of his wife's pregnancy at such a period that it can not be attributed to his own acts of conjugal intercourse. A problem arises if he continues to have intercourse while his female relatives discuss the probabilities, for he is not likely to do the calculations unaided.

A state of knowledge, as so often in law, is imputed to him, even though objective proofs of his knowledge are

unattainable.¹

Although the term "discovered" is not defined either in the HMA, the Kenya ordinance or in the MCA 1937, 1950, it appears that, to arrive at one, an objective test must be applied, i.e., whether the facts before the petitioner would have made clear to a reasonable man that the respondent was so pregnant. The petitioner would be barred from petitioning for nullity, under this clause, if he chose to have sexual intercourse with the respondent, having in mind the facts laid before him, without determining whether his suspicions were correct. This is in substance the meaning of "discovered" which has been² or might be, taken by the Courts.

In Sivaguru V Saroja,³ for example, (where it was alleged that it would be for the respondent to show, upon

1. See N.R. Raghavacharar: Hindu Law, p.931. "...if marital intercourse was shown to have taken place between the petitioner and the respondent after the discovery by the petitioner of the pregnancy of the pregnancy - a circumstance which would be fatal to the maintainability of the petition - the only way in which the petitioner could overcome this hurdle of objection is by proving that the marital intercourse which was had was not with the petitioner's consent, but that he had been forced to it by threat or duress overpowering his will."
2. Sivaguru V Saroja A.I.R. 1960 Mad. 216 (discussed below) and Smith V Smith (C A) [1947] 2 All. E.R. 741 (discussed below). See also Lawrence V Lawrence [2 June, 1954] unreported cited in Rayden on Divorce (9th Edn) pp.121-22.
3. Cited above ~~as~~.

proof by the petitioner of pregnancy per alium at the time of marriage, that subsequently there was marital intercourse between the parties even after the petitioner had discovered, or had grounds to infer, the existence of the case for decree) the Court, following Smith V Smith,¹ appears to have taken the meaning of "discovered" as "... when he [the petitioner] had grounds for reasonably inferring the case for annulment". Smith V Smith² provides an even clearer instance of the meaning of "discovered" where the position has been admirably summed up by Bucknill, L.J. The argument put forward on the petitioner's behalf was that,

"there³ was a finding by the learned judge that the husband was not positively convinced that his wife was pregnant by another man when he had intercourse with her ... and, as I [Bucknill, L.J.] understand the argument, counsel for the husband said that in this particular case it was essential that the husband should believe that his wife was pregnant in that way before the proviso [S.7(1)(d)(iii) of the MCB, 1937] came into operation."

1. (CA) [1947] 2 All.E.R. 741.

2. *ibid.*

3. *ibid* at p.743.

Bucknill,¹ L.J., rejecting this argument observed that,

"while thinking that such belief must play its part in considering whether the husband had discovered the existence of the grounds for a decree, I do not myself think it is a condition precedent for the operation of the proviso. It might very well be that the husband refused to believe in the teeth of overwhelming evidence. It is an old saying. "None so blind as those who won't see" and, if the belief in those circumstances is essential for the proviso to come into operation, I think a grave injustice would be done to the wife because one must take into account her position also. It may be that she was to blame in the first instance, but she must be allowed to say that, if the husband knew or ought to have known that she was pregnant at the time of the marriage, and, notwithstanding, chose to have connection with her, she is entitled to relief under the proviso and to say that the husband is debarred from obtaining a decree of nullity."

It is self-evident that this view of the law will be applicable to a case under HMA because the husband who has discovered that his wife is pregnant by another and still has marital relations with her is presumed to have condoned the fact.

(ii) Intercourse with the Consent...

The question is: whether there can be intercourse

1. Smith V Smith (C.A.) [1947] 2 All. E.R. 741 at 743.

without consent? Is there possibility of non-consensual intercourse, e.g. where the petitioner is a lunatic or a minor or drugged?

It is submitted a husband who has intercourse, which is not induced, by the fraud of the wife, after the knowledge of the facts, should thereby be regarded as condoning his wife's misconduct. However, it has been rightly suggested that "marital intercourse with consent of the petitioner" are superfluous¹ words in view of the dicta in Henderson V Henderson² (discussed below).

In Roberts V Roberts,³ for example, where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery and it appeared that she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her; it was held by Hill, J, that, since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree.

1. J.D.M. Derrett: Introduction to Modern Hindu Law, p.195.

2. [1944] 1 All. E.R. 44.

3. [1917] 117 L.T. 157.

Similarly, the House of Lords considered the question in Henderson V Henderson¹ where Viscount Simon, L.C., observed that,

²"... I know nothing in the earlier decisions, either in the ecclesiastical Courts or in the Divorce Court in England, which supports the view that a husband who has intercourse, which is not induced by the fraud of the wife, after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct." Thus, if the husband has intercourse with the wife after knowing the facts which would have made clear to a reasonable man that she was pregnant, as required under the clause, the Court will refuse to grant a nullity decree notwithstanding that the petitioner was a lunatic, or a minor etc.

III The Standard of Proof:

A petitioner who proves to the "satisfaction" of the Court, that the respondent has been pregnant as required under this clause is entitled to a decree of nullity. There are, however, various questions to be considered: what

1. [1944] 1 All. E.R. 44

2. [1944] 1 All. E.R. 44 at 45.

precisely is the standard of proof required to "satisfy" the Court before it can pass a decree? Is the evidence of non-access by the husband admissible in evidence? Is evidence of a blood test admissible? Can the Court order the wife or the child born since the marriage to undergo a blood test?

(1) Nature of standard of proof:

The question is sometimes put in this form: whether the standard of proof required in a suit under this clause, which is a kind of civil action is "criminal standard of proof, i.e., beyond reasonable doubt, or the "civil standard of proof", i.e., balance of probabilities.¹ There has been a conflict of opinion on the question. There are cases on one hand, such as Churchman V Churchman² and Senat V Senat³ holding, respectively, that,⁴ "the same strict

1. In Miller V Minister of Pensions [1947] 2 All.E.R.372; Lord Denning discusses the degrees of standard of proof. In Wright V Wright [1948] 77 C.L.R. 191 the Australian High Court recognises a real distinction between a civil and criminal standard of proof.
2. [1947] 2 All. E.R. 190.
3. [1965] 2 All. E.R. 505.
4. Churchman V Churchman op.cit. per Lord Merriman, P, at p.195. This dictum has been applied in Ginesi V Ginesi. [1948] 1 All. E.R. 373. Ginesi V Ginesi was referred to by Mudholkar, J, in Mahendra V Sushila (S.C) [1964] Bom. L.R. 681 at 693 = A.I.R. 1965 S.C. 369. See also Fairman V Fairman [1949] 1 All. E.R. 938; Gallar V Gallar C.A. [1954] 1 All. E.R. 536.

proof is required in the case of a Matrimonial offence as is required in connection with criminal offences properly so called" and "...¹ it [adultery] must be proved with the same strictness as is required for proof of a criminal charge; in other words it must be proved beyond reasonable doubt". On the other hand, it has been held that "the divorce Court is a civil Court, and it should not adopt the rules and standards of a criminal Court".²

What is the statutory requirement as to the standard of proof? Shall a criminal or civil standard of proof be followed by the Courts?

(2) Statutory requirements:

The statutory requirement as to the standard of proof is that the Court must be "satisfied".³ The question is: what is meant by "satisfied" and how can satisfaction be arrived at? What is the value of admissions against the respondent?

1. Senat V Senat [1965] 2 All. E.R. 505. per Sir Jocelyn Simon, P, at p.507.
 2. Bater V Bater [1950] 2 All. E.R. 458.
 3. S. 23 HMA.

(i) Meaning of "satisfied":

In a case under this clause the issues involved are of great public importance and public policy requires that the evidence must be clear and conclusive, i.e., (a) beyond a mere balance of probabilities¹ and (b) it will satisfy "the guarded discretion of a reasonable and just man".² In Preston-Jones V Preston-Jones³ the standard of proof laid down was proof beyond reasonable doubt because, as Lord Macdermott,⁴ observed, "it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be satisfied, in respect of a ground for dissolution, with something less than proof beyond reasonable doubt".

In White V White,⁵ a case under the Indian Divorce Act 1869, the Indian Supreme Court noticing favourably Preston-Jones V Preston-Jones,⁶ held that it is the duty of the Court to pronounce a decree only when it is satisfied that the case has been proved beyond reasonable doubt as

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1. Preston-Jones V Preston-Jones (C.A.) [1951] 1 All.E.R. 124.
 2. Loveden V Loveden [1810] 2 Hagg. con 1 at 3 = 161 E.R. 648 at p.649.
 3. [1951] 1 All. E.R. 124.
 4. *ibid* at p.138.
 5. [1958] 1.S.C.R. 1410. See also Mahendra V Sushila A.I.R. 1960 Bom. 116. (judgment in the same case in the High Court) where the case was remanded for further investigation.
 6. C.A. [1951] 1 All. E.R. 124.

to the commission of a Matrimonial offence. Similarly, in Mahendra V Sushila¹ referring to Preston-Jones V Preston-Jones and White V White that Court observed that, "It follows that what the court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by some one else at the time of the marriage. It is interesting to note that Mudholkar, J.² (dissenting) said that, "what the Court has said in White's case about the applicability of the rule in Preston-Jones V Preston-Jones must also apply to a case under the Hindu Marriage Act".

(ii) How can satisfaction be "arrived at?"

The statutory satisfaction contemplated under this clause can be arrived at in a variety of ways. It can be arrived at on one hand on the basis of evidence oral or documentary or direct or circumstantial led in the case. On the other it may be arrived at, subject to the discretion of the Court, on the basis of admissions of the parties. Raghubar³Dayal, J, delivering the judgment of the Court in

1. [1964] Bm. L.R. 681

2. *ibid* at p.695.

3. Mahendra V Sushila [1964] Bm. L.R. 681 at 686.

Mahendra's case, observed that, "we are of the opinion that in proceedings under the Act the Court can arrive at the satisfaction contemplated by S.23 [of HMA] on the basis of legal evidence in accordance with the provisions of the Evidence Act and that it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admission of the parties alone."

(iii) Value of admissions.

If admissions are freely to be utilized in India Matrimonial cases certain dangers follow, due to the inexperience of pleaders and the lack of skill and independence in the parties themselves. A respondent may plead that her pregnancy was due to the petitioner whereupon it will be held that she had admitted that she was pregnant at the material date.

An admission may be defined as a concession or voluntary acknowledgement made by a party or some one identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case.¹ The general rule is that, subject to statutory provisions² and the discretion of the Court, a fact admitted

1. Ajodhya Prasad V Bhawani Shankar, A.I.R. 1957 All.1.

2. S.58 [Indian] Evidence Act; R 6 0 12 CPC; R 5 0 8 CPC.

if clear and unequivocal, need not be proved,¹ i.e., admission itself serves as proof.

The position, as to the value of admissions, is admirably stated by the Supreme Court in Mahendra V Sushila² where it was said, "Admissions are to be ignored on the grounds of prudence only when the Court, in the circumstances of a case, is of opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it would be proper for the court to act on these admissions without forcing the parties to lead other evidence to establish the facts admitted, unless of course the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted".

(3) Standard of proof to be followed:

There is a strong possibility that the criminal standard will not be followed by the Courts in considering concealed-pregnancy cases, as we shall consider, for two reasons, namely,

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1. Rameshwar Dayal V State A.I.R. 1954 HP 21.
 2. [1964] Bom.L.R. 681 at 687; see also Arnold V Arnold [1911] 1 L.R. 38 Cal. 907.
I.L.R. 38 Cal; Over V Over [1924] 27 Bom. L.R. 251
both cited in Mahendra V Sushila [1964] Bom.L.R. 681.

- (i) This view relies for its validity, on an entirely unconvincing authority; and
- (ii) The expression "beyond reasonable doubt" is not entirely harmonious with the fact that the ground we refer to as "concealed - pregnancy" is not to be regarded as a criminal or quasi-criminal offence.

(i) View relies on an unconvincing authority:

(a) In Ginesi V Ginesi,¹ the Court of Appeal unreservedly approved the obiter dicta in Churchman V Churchman,² (see above p.33^a) a case regarding standard of proof as to the allegation that a husband had connived in his wife's adultery. The Court of Appeal recognised in both cases that the same principles apply to an allegation of connivance of adultery as to adultery itself. The obiter dicta in Churchman V Churchman appears to have been arrived at, with due respect, by a misunderstanding on the part of their Lordships. Lord Merriman, P,³ relied on an observation of Lord Wensleydale in Gripps V Gripps,³ which said,⁴ "That the Court is to be satisfied as far as it reasonably can, that the adultery has been proved, and the petitioner has not been in any manner accessory to, or connived at, adultery, and that he has not condoned the same". It is

1. [1948] 1 All. E.R. 373.

2. [1947] 2 All. E.R. 190.

3. [1864] XI H.L.C. 1 = 11 E.R. 1.230.

4. *ibid* at p. 1236.

submitted that Lord Merriman, P, in Churchman V Churchman used rather broader words, which do not follow from the case relied upon by His Lordship and its acceptance in other cases, as applying to all matrimonial cases cannot be justified. Similarly in Senat V Senat¹ the observation that, "it must be proved with the same strictness as is required for proof of a criminal charge, ... In my view that is clearly established by Ginesi V Ginesi; Preston-Jones V Preston-Jones and Galler V Galler." also appears to have been arrived at, with due respect, by a misunderstanding on the part of His Lordship. There is no justification, it is submitted, for Sir Jocelyn Simon, P,'s² observation relating to Ginesi V Ginesi,³ Preston-Jones V Preston-Jones⁴ and Gallar V Gallar.⁵ The obiter dicta in Churchman V Churchman,⁶ as we have seen itself has been arrived at on misunderstanding of judicial authority. In Preston-Jones V Preston-Jones, Lord MacDermott made it clear that,⁷ "... I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law..."

1. [1965] 2 All. E.R. 505 at 507.

2. Senat V Senat [1965] 2 All. E.R. 505 at p.507.

3. [1948] 1 All. E.R. 373.

4. *ibid*.

5. [1954] 1 All. E.R. 536.

6. [1947] 2 All. E.R. 190.

7. *ibid* at p.138.

(b) In Ginesi V Ginesi⁷ the question of standard of proof was not properly argued and investigated. The Court observed that,² "Counsel for husband does not dispute that it [the obiter dicta in Churchman V Churchman] is an accurate statement of the requirements of proof of adultery in divorce proceedings..." This concession by Counsel made matters worse. Further the authorities referred to by the Court nowhere suggest that the dicta in Churchman V Churchman might be correct. On the contrary the decision of House of Lords in Mordaunt V Mancreiffe,³ where it was decided that a suit for divorce for adultery, is a civil and not a criminal matter, and that the analogies and precedents of criminal law have no authority in divorce cases "strikes at the root" (to use Lord Dennings phrase)⁴ of Churchman V Churchman and Ginesi V Ginesi.

(c) Similarly in Ginesi V Ginesi and Churchman V Churchman the Court did not foresee the following consequence of applying the so-called criminal standard of proof. If the principles of the criminal standard of proof are to be applied the spouse is to be acquitted of adultery if there

1. [1948] 1 All. E.R. 373.

2. *ibid*

3. [1874] 30 L.T. 649.

4. Gower V Gower [1950] 1 All. E.R. 804.

is some reasonable hypothesis compatible with innocence that is not convincingly excluded by the proofs advanced, notwithstanding that the Court has no belief in the hypothesis.¹

(d) In recent cases it has been held that the criminal standard of proof is not necessarily called for in divorce suits. In Davis V Davis² and Gower V Gower³ the Court observed, respectively, that, "... the word "strict" is sufficiently apt to describe the measure and standard of proof required of a charge of cruelty and that it is unnecessary to introduce any question of the standard of proof required of a criminal charge" and, "I do not think that this Court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt." In Wright V Wright⁴ it was held by Latham C.J., Rich and Dixon JJ. that the standard required for the proof of a criminal offence is not applicable to the proof of adultery in a Matrimonial Cause. The Madras High Court in V. Varadarajula

1. Wright V Wright [1948] 77 C.L.R. 191.

2. (C.A.) [1950] 1 All. E.R. p.40 per Bucknill, L.J., at p.42.

3. (C.A.) ibid at p.804 per Denning, L.J: at p.805.

4. [1948] 77 C.L. R 191.

Baby Ammal¹ relying on Davis V Davis,² Miller V Minister of Pensions³ and Lovedon V Lovedon⁴ held that though there was no direct evidence, the evidence was strong and sufficient to come to the conclusion that the respondent was living in adultery.

(ii) "Concealed-pregnancy" is not to be regarded as a criminal or quasi-criminal offence.

We know that a suit under this clause is a civil and not a criminal proceeding. In such a case, therefore, "... in the ordinary way the rules of civil procedure and not the rules of criminal procedure would apply..."⁵ The requirements of a higher standard of proof [i.e. beyond reasonable doubt as applied to a criminal proceeding] was a measure of mercy 'thrown' to those who were potentially liable to punishment⁶ [by the Crown]. The absence of such consideration, in a civil action, requires the exclusion of "higher standard" in nullity proceedings. The reason being that the Courts are concerned with giving relief to the parties, not punishment or retribution.

1. A.I.R. 1965 Madras 29.

2. C.P. [1950] 1 All. E.R. 40.

3. [1947] 2 All. E.R. 372.

4. [1810] 2 Hogg. CM. 1 = 161 E.R. 648.

5. per Lord Denning in Davis V Davis (C.A.) [1950] 1 All. E.R. 40 at 42. relied on in Varadarajulu V Baby Ammal. A.I.R. 1965 Mad. 29.

6. J.A. Courts "The standard of proof of adultery" [1949] 65 LQR 220.

See also "The standard of Proof of Adultery" [1950] 66 LQR pp.35-38

The question is: what is the test, if we follow the "Civil standard of proof"(i.e.,balance of probabilities) of such a degree of probability? Does it imply a strict standard of proof? or Does it mean to the satisfaction of a prudent man, i.e., an objective test may be applied? The case may be proved by a preponderance of probability, but there may be degrees of probabilities within that standard. The degree depends on the subject matter.¹ Sir William Scott put the matter succinctly in Loveden V Loveden² as,

"... the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion..."

Lord Denning, L.J.,³ (as he then was) commenting on the case said that "the degree of probability which a reasonable and just man would require to come to a conclusion - and likewise the degree of doubt which would prevent him from coming to it - depends on the conclusion to which he is required to come ... if he was left in real and substantial doubt on the particular matter, he would hold the charge not to be established. He would not be satisfied about it."

1. Bater V Bater [1950] 2 All. E.R. 458.

2. [1810] 2 Hogg Con.3 = 161 E.R. p.648 at p.649.

3. Bater V Bater [1950] 2 All. E.R. 458 at 459.

The question is: what is a real and substantial doubt? A real and substantial doubt is, according to Lord Denning, L.J., "...¹ another way of saying a reasonable doubt, and a "reasonable doubt" is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. So the phrase "reasonable doubt" gets one no further. It does not say that the degree of probability must be as high as ninety-nine per cent, or as low as fifty-one per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject matter ... when this is realised, the phrase "reasonable doubt" can be used just as aptly in a civil or a divorce case as in a criminal case..."

It is submitted that in cases under HMA or the ordinance the expression "beyond reasonable doubt" must be understood as providing for proof beyond reasonable doubt in the sense that on the facts and circumstances established by the petitioner a prudent man, i.e., the judge, would be completely satisfied as to the facts alleged.

1. Bater V Bater [1950] 2 All. E.R. 458 at 459.

IV Proof of non-paternity of petitioner.

Proof of a negative is extremely difficult and in practice proof that the child, whose existence forms the ground for the petition, is not the child of the petitioner proceeds either on the footing that the petitioner had no access to the respondent at the relevant period or, less frequently, that the petitioner was impotent.

1. Evidence of non-access

There is nothing to prevent a husband or a wife, under the Hindu Marriage Act, giving evidence of non-access at the material time. This will be so even though the result of receiving such evidence may be to declare illegitimate one who would otherwise be presumed to be a legitimate child of the marriage.¹

2. Presumption of certain facts

A presumption is a rule of law² that attaches definitive probative value to specific facts and raises such a high degree of probability in its favour that it must prevail unless clearly met and explained and overturned (i.e. rebutted) by explanatory proof to the satisfaction

1. S.112. [Indian] Evidence Act; Sreeni Vasan V Kirubai A.I.R. 1957 Mad. 160.

2. Seithammara V Koyommatath Mammod A.I.R. 1957 Ker. 63;
Kansi Ram V Jai Ram A.I.R. 1956 H.P.4.

of the Court.¹

The presumption under section 112 of the [Indian] Evidence Act applies subject to proof of impossibility of access. "Presumption of paternity" will be drawn by all Courts,² irrespective of whether the mother was married or not at the time of the conception.³ Further, section 114 of the [Indian] Evidence Act provides that, "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to common course of nature, events, human conduct and public and private business, in their relation to the facts of the particular case."

In Mahendra V Sushila⁴ the Supreme Court, as to section 114, observed that,⁵ "The conclusion we have arrived at about the child born to the respondent being not the child of the appellant, fits in with the presumption to be drawn in accordance with the provisions of this section[114 of the Indian Evidence Act]."

The Court considering the question of the proof of non-access and legitimacy of the child under section 112 of

1. Fatah Gagan V Sardara A.I.R. 1958 PU.333.

2. Jambapuram Subhama V J. Venkata Redd. A.I.R. 1950 Mad. 394.

3. Thandi Ram V Jagan Nath A.I.R. 1937 Lah. 784.

4. [1964] Bom. L.R. 681.

5. *ibid* at p. 689.

the Evidence Act, observed that,¹"The question of the legitimacy of the child born to the respondent does not directly arise in this case, though the conclusion we have reached is certain to affect the legitimacy of the respondent's daughter. However, the fact that she was born during the continuance of the valid marriage between the parties can not be taken to be conclusive proof of her being a legitimate daughter of the appellant ... as it has been found by the Courts below, and the finding has not been in question here before us, that the appellant had no access to the respondent at the relevant time."

3. Blood test:

Blood tests are relevant if the number of days between the marriage and the birth is such that the child might be the fruit of the marriage. By a blood test the petitioner may prove that, the child not being his, and the circumstances of the respondent's life leaving no room for suspicion of adultery on her part, the child must have been conceived before the marriage. Such situations are bound to arise, in which the child could otherwise claim legitimacy,

1. [1964] Bom. L.R. 681 at 690.

and yet his mother is in a fork between divorce for adultery or nullity for concealed-pregnancy, and the blood test appears the vital means of settling his status.¹

A blood test is admissible in evidence provided it be offered by the parties voluntarily. The court has, it appears, no power to order the wife or the child born since the marriage to undergo a blood test.¹

There are two reported cases in which the results of blood tests voluntarily undergone by the parties have been put in evidence in order to prove that a husband-petitioner, in a divorce suit, was not the father of a child born to the wife for the purpose of establishing the wife's adultery. The cases are, Liff V Liff² and H V Hand C.³ In both cases the evidence was similar. The husband and wife were both of blood group O and the child was of group A. There was medical evidence that a child of group A could not be produced by two parents both of group

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1. See W V W (no.4) (C.A.) [1963] 2 All. E.R. 841 affirming Cairns, J., 's decision in W V W (no.4) [1963] 2 All.E.R. 386.
 2. 1948 W.N. 128.
 3. [1962] "The Times" March 23.

O.¹ This was accepted by the Court.

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1. Samson Wright : Applied Physiology. (O.U.P. [1965] 11th Edn. p.73.

[Human beings can be divided into four main groups according to the presence (or absence) in their red cells (and in certain tissue cells) of the substances called A, B, and O.

The groups are correspondingly called group A, group B, group AB, and group O. More refined analysis shows that substance A can be subdivided into sub-groups called A₁ & A₂; includes 75% of all group A, A₂ forms 25%.

Group AB is similarly divided into A₁B and A₂B.]

INHERITANCE OF CLASSICAL BLOOD GROUPS

The four classical blood groups depend on three genes named after the corresponding factor A, B, and O. Each person's blood group is determined by the two genes which he receives from each parent. Genes A and B, whether present in the red cell separately or together, may be demonstrated by the use of Anti-A or Anti-B serum. The presence of the O gene is not easily demonstrated, and to Anti-A serum AA and AO cells react alike, both serologically being group A.

Accordingly:

If person receives	{ A+A	B+B	A+B	O+O
	{ or	or		
genes	{ A+O	B+O		
His blood group is	A	B	AB	O
His genotype is	AA	BB		
	or	or		
	AO	BO	AB	OO

This information can be used in investigating cases of disputed paternity. A baby must receive one of three possible genes (A,B or O) from each parent. Further, each parent transfers one of two genes to the child: an A parent (genotype AA or AO) can give A or B, a B parent (genotype BB or BO) B or O, and AB parent A or B, and an O parent (OO) O only. It must be remembered, however, that the child's blood may not be set in its true ABO

continued

type until as late as one year after birth.

It follows that:

If the Baby's group is	Parents must have given it	So if mother was	Father could not have been
O	O+O	No matter which	AB
AB	A+B	" "	O
A	(A+O) (or) (A+A)	B or O	B or O
B	(B+O) (or) (B+B)	A or O	A or O

The medico legal value of blood groupings tests is greatly enhanced if the MN and the various Rhesus factors are also studied.

The M & N factors depend on two minor blood genes. It is very rare indeed for these two elicit an output of Agglutinins when injected into man and they may therefore be ignored in carrying out transfusions. They are, however, antigenic to rabbits and agglutinating sera can be prepared by injecting human M or N cells into rabbits.

Each person carries two of the genes of the M & N group, i.e., M+M (=M), N+N (=N), or M+N (=MN). As a result:

If a baby's supplementary group is -	Parents must have given it -	So if mother's supplementary group was -	Father could not have been -
M	M+M	No matter which	N
N	N+N	" "	M
MN	M+N	N	N
MN	M+N	M	M

It should always be remembered that blood grouping tests can never prove that any suspected person is the actual father; they can only show that he could not possibly have been the father or that he (like many others) might have been.

It is self-evident that these cases will be applicable to a case under HMA if the parties themselves tender the evidence.

In W V W¹ the Court refused to order a blood test because in that case it was not in issue that at the time of the marriage the wife was pregnant. The difficulty in the case was caused by the fact that the husband admitted that he himself had sexual intercourse with the wife before marriage. He alleged that the wife also had sexual intercourse with another man or men. The court said that it has no power to order such a test [i.e. a blood test]. In Mehendra V Sushila² this case [here the case cited was Cairns, J's³ decision which was subsequently affirmed by the Court of Appeal⁴] was referred to but the Supreme Court did not consider the question of a blood test.

It is submitted that this should be left to the discretion of the Court because it may depend on the facts of a case whether to make such an order or not.

1. [1963] 2 All. E.R. 441.
 2. [1964] Bm. L.R. 681.
 3. [1963] 2 All. E.R. 386.
 4. W V W (no.4) [1963] 2 All. E.R. 841.

V "Concealed-pregnancy" in Kenya and Uganda

In Uganda, we do not find specific reference to concealed-pregnancy", as a ground for nullity. However, it is submitted that, in Uganda, this may well be imported under "fraud". The principles applicable to a case under HMA, ~~(see above, pp. ———)~~, it is submitted, may be applied by the Courts in Kenya and Uganda.

CHAPTER VIII

VENEREAL DISEASE

I. Introduction:

A marriage is voidable, under The [Kenya]¹ Hindu Marriage and Divorce Ordinance, 1960, where the respondent was at the time of the marriage suffering from venereal disease in a communicable form.

These provisions appear to have been based upon section 8(1)(c) of the [English]² Matrimonial Causes Act, 1950, re-enacting section 7(1)(c) of the Matrimonial Causes Act, 1937. We find, however, that in the parallel provisions of HMA or Uganda Ordinance there is no specific reference to venereal disease as a ground for nullity. It is submitted, this (until adopted as a ground) may well be imported under "fraud". To the extent to which non-disclosure of certain defects amounts to fraud (above, p.) non-disclosure of an advanced stage of venereal disease may amount to "fraud" under the HMA or Uganda ordinance.

1. Cap. 157. section II(1)(b)(IV).

2. S.8(1)(c) provides "... that the respondent at the time of the marriage suffering from venereal disease in a communicable form"; As to venereal disease as a ground for "nullity" generally see, J. Jackson, The Formation and Annulment of Marriage, pp.76-77; J.D.M. Derrett, Introduction to Modern Hindu Law, p.541; Latey on Divorce (14th Edn.) p.214; Rayden on Divorce (9th Edn.) pp.121-22; Webb and Beavan, Sourcebook of Family Law, p.95.

II. Venereal disease in a communicable form:

The question is: what is meant by "in a communicable form"? Does it mean communicable to the husband or to any person? It has been observed in *Latey on Divorce*¹ that, "The question whether the Act would cover a case where the disease is only communicable to progeny and not to the petitioner may arise for decision."

The expression "in a communicable form" would mean, it is submitted, a venereal disease, which has been defined in the Venereal Diseases Act, 1917,² as "syphilis, gonorrhoea, or soft chancre" for the purpose of that Act, communicable to any person. The only available case on the question is Lawrence V Lawrence³ where Judge Lawson Campbell decided that "communicable" meant "communicable to any person", so that where the wife's syphilis was communicable to a child of the marriage but not to the husband, the husband was entitled to a decree.

1. at p.214.

2. S.4.

3. [June 2, 1954] unreported; Cited in Rayden on Divorce (9th edn.) at pp.119-20.

III. Preliminary requirements:

Where relief is sought on the ground of venereal disease it is required that the Court shall be satisfied on the following matters, namely:

- (1) that the petitioner was at the time of the marriage ignorant of the facts alleged;¹
- (2) that the proceedings were instituted within a year from the date of the marriage,² and
- (3) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.³

(1) "ignorant" of the facts alleged:

The term "ignorant", under the proviso, means that in the circumstances of the case the petitioner, as a reasonable man, was not aware at the time of the marriage of the fact that the respondent was suffering from venereal

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1. Cap.157. S.11(1)(b)(V)(i) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960. See also S.8(1)(d)(i) M.C.A. 1950.
 2. Cap.157. S.11(1)(b)(U)(ii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960. See also S.8(1)(d)(ii) M.C.A. 1950.
 3. Cap.157. S.(11)(1)(b)(v)(iii) The [Kenya] Hindu Marriage and Divorce Ordinance, 1960. See also S.8(1)(d)(iii) M.C.A. 1950.

disease in a communicable form¹(as to detailed treatment of the meaning of "ignorant" see under Concealed-pregnancy).

(2) That the proceedings were instituted within one year:

The petitioner is barred from petitioning under the proviso, if the petition was presented after the expiration of time prescribed for its presentation. This period, it is submitted, is absolute and cannot be extended for the Ordinance has expressly delimited the period after the expiry of which an action under this proviso can not be brought.² (as to a detailed discussion see under Concealed-pregnancy).

(3) That marital intercourse with the consent of the petitioner has not taken place:

The question is: (as was under Concealed-pregnancy) what do the terms "discovered" and "intercourse with the consent of the petitioner" mean?

(i) Meaning of "discovered":

It is submitted that, under the proviso, "discovered"

1. Jackson V Jackson [1939] 1 All. E.R. 4715. See also Sivaguru V Saroja, A.I.R. 1960 Mad.216.
Savalram V Yeshodabai, A.I.R. 1962, Ban. 190.
2. See Chaplin V Chaplin (C.A.) [1947] 2 All. E.R. 408.

means that in the circumstances of the case the facts before the petitioner would have made clear to a reasonable man that the respondent was suffering from a venereal disease in a communicable form (as to a detailed discussion see under Concealed pregnancy) and the petitioner would be barred from petitioning for nullity, under this proviso, if the petitioner chose to have sexual intercourse with the respondent, having in mind the facts laid before him.¹

In C V C,² the husband prayed for annulment of the marriage on the ground that the wife was at the time of the marriage, suffering from a venereal disease in a communicable form. The wife, by her answer, alleged that the husband was disentitled to relief because he had had sexual intercourse with her on two occasions after the 1st June (the date on which the husband first learned of the wife's condition and after which he continued to share a bed with her for about a fortnight. Karminski, J, accepted the husband's evidence that his reason for continuing to share a bed with the wife after he discovered her condition was that he did not want her parents, in

1. See Smith V Smith (C.A.) [1947] 2 All.E.R. 741; see also Sivaguru V Saroja, A.I.R. 1960, Mad. 216.
 2. [1962] 106 (Vol.ii) The Solicitor's Journal, p.959.

whose house the parties were living, to know the true state of affairs, and that marital intercourse did not take place after 1st. June. In the result, it was held, that the husband was entitled to a decree nisi of nullity.

Similarly in Lawrence V Lawrence,¹ a husband was informed through a clinic that the wife had syphilis. The wife falsely persuaded him that in consequence of a later blood test she in fact had not got venereal disease. In reliance of that false information the husband had sexual intercourse with her twice. It was held by Judge Lawson Campbell, that the husband was not fixed with knowledge at the time he had the sexual intercourse, because a reasonable man would not have thought it necessary to make further inquiries after the wife's assurance.

(ii) Intercourse with the consent:

The words "intercourse with the consent of the petitioner" under this clause means the same thing as under "Concealed-pregnancy", i.e., they are necessary in view of the dicta in Henderson V Henderson.² (As to a detailed

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1. [June 2, 1954] unreported, cited in Rayden on Divorce, (9th Edn.) p.122.
 2. [1944] 1 All. E.R. 44; Roberts V Roberts [1917] 117 L.T. 157. See also J.D.M. Derrett, Introduction to Modern Hindu Law, p.195.

discussion see under Concealed-pregnancy).

IV. The standard of proof:

The question is: what precisely is the standard of proof required to satisfy the Court before it can pass a decree? Karminski, J, (considering a nullity petition on the ground of "venereal disease in a communicable form"), observed in C V C¹ that,

"Whether the degree of that onus of proof was described as being to satisfy the Court beyond reasonable doubt, or by saying that the Court must be satisfied as to be sure, was a philological difference merely".

The standard of proof in such a case, it is submitted, must be that of a prudent man, i.e., that on the facts and circumstances established by the petitioner a prudent man, i.e., the Judge would be completely satisfied as to the facts alleged.²

1. [1962] 106(ii) The Solicitor's Journal, p.959 at p.960.

2. See above "The Standard of Proof" under Concealed-pregnancy.

CHAPTER IXCONCLUSIONS

(1) We find that in the dharmasastra nullity existed. A marriage was void if the parties to the marriage were within the degrees of prohibited relations. Similarly, a marriage was voidable on the ground of incurable impotence, force or fraud which included fraudulent concealment of impotence, insanity, a chronic or loathsome disease, or any other serious defect of the purporting bride or the bridegroom, and finally nondisclosure of such defects. We also find that in pre-1955 law "nullity" was possible on the ground of impotence, force or fraud and later bigamy. The HMA and parallel laws of Kenya and Uganda enacted various grounds on which a marriage might be annulled.

(2) A marriage is void if either party has a spouse living or of the former husband or wife of either party was living, at the time of the marriage. The terms "spouse living" and "former husband or wife of either party was living" implies that, at the time of the second marriage, there is a prior valid subsisting marriage. A spouse may rely on the "presumption of death" of the other spouse and may marry again without committing bigamy. Similarly, a spouse whose other spouse has disappeared may remarry, after making all possible inquiries, relying on the presumption of death of the other spouse and the Court, in any future

proceedings, with regard to such a marriage as binding in the absence of evidence to the contrary. However, a marriage contracted in contravention of section 15 HMA shall be voidable. The use of words "marriage" and "solemnized" indicate that it is essential for the second marriage to be bigamous that it should have been celebrated with proper ceremonies and in due form.

(3) A marriage between parties who are within the degrees of prohibited relationship, or prohibited degrees of consanguinity or where the parties are sapindas of each other is void. The degrees of prohibited relationship, or prohibited degrees of consanguinity, or sapinda relationship include relationship by half, uterine and full blood. It also includes illegitimate blood relationship as well as relationship by adoption. It is punishable to 'procure' the solemnization of one's own marriage in contravention of the law relating to degrees of prohibited relationship and sapindaship. This clause is absolute and should be construed strictly.

The reason for the rule prohibiting a marriage on the ground of degrees of prohibited relationship, or prohibited degrees of consanguinity, or sapinda relationship is to avoid the possibility of incestuous intercourse.

The restriction relating to the prohibited degrees

of consanguinity and sapindaship may be enacted if a custom permitting such a marriage may be adequately proved.

(4) Impotence, to be a ground for nullity under HMA or the Kenya and Uganda Ordinance, may be defined as a practical disability for sexual intercourse due to some malformation and/or invincible repugnance to the act of sexual intercourse generally or quoad hanc (to a particular woman) or hunc (to a particular man) due to nervous and/or psychic disorder either proved as a fact or inferred from the conduct of the alleged impotent spouse.

It is to be noted, however, that wilful refusal to consummate as distinct from inability to consummate, is not a ground for nullity under HMA, Kenya or Uganda Ordinance. It is also to be noted that sexual intercourse with the use of contraceptives or contraceptive measures or where the husband had invariably adopted the practice of coitus interruptus is complete intercourse for sexual intercourse is, for the purposes of nullity, erectio and intromissio without necessarily ejaculatio. Similarly, we find that merely conception and birth of a child, which may be due to fecundatio ab extra or by artificial insemination, does not itself establish that "intercourse in law" has taken place, i.e., the marriage has been consummated. Thus the following instances may be held to amount to impotence: incurable, or

curable with danger to the spouse concerned, structural malformation, a venereal disease making normal intercourse impossible, a nervous and/or psychic disorder making the respondent incapable of sexual intercourse in general or quoad hanc or hunc. An inference of impotence may be inferred by the Court due to failure on the part of the respondent to consummate the marriage after a reasonable time, or due to refusal to undergo medical examination and/or treatment. However, the circumstances favouring an inference of impotence are not reasons for disability. However, sterility can not be the synonym of impotence.

Impotence may either be proved by medical examination of the parties (in which case the medical evidence must be strictly proved) or by examination of the parties as witnesses (in which case the admissions of the respondent are sufficient to establish the case, unless the litigation is collusive and corroboration is not essential, although is required). The standard of proof of impotence is a reasonable conclusion based on fair inferences which would satisfy a prudent man, i.e., the judge, that the respondent is and has been impotent.

A decree of nullity of marriage may be refused where the petitioner has approbated the marriage or where the petitioner is taking advantage of his or her disability or where the petition is presented or prosecuted in collusion with the respondent.

(5) A marriage may be annulled under HMA and Uganda Ordinance on the one hand and Kenya Ordinance on the other where either party to the marriage was, respectively, an idiot or a lunatic and a person of unsound mind, or subject to recurrent fits of insanity or epilepsy. The test required, in determining whether a spouse is an idiot or a lunatic or a person of unsound mind, is not a question of mere weakness of intellect or the capacity to enter into a financial agreement. The test of mental incapacity is: whether the party alleged to be idiot, or lunatic or person of unsound mind, on the date of the marriage, was capable of understanding not only the nature of the marriage he or she was entering into but the duties and responsibilities created thereby. There is a presumption of sanity in favour of the validity of a marriage, solemnized in due form. However, a guardian cannot form an intention to marry on behalf of his or her ward.

(6) A marriage may be annulled on the ground that the consent of the petitioner or the guardian in marriage, where necessary, was obtained, before or at the time of the marriage, by force or fraud. The personal consent of the child bride or groom is not pre-requisite and a childbride or groom can not have her or his marriage annulled for non-age or want of consent. The HMA does not leave open other

grounds of nullity which are not specifically listed, nonetheless, a marriage may be annulled where there is total want of consent, which may be due to mistake in the identity of the person, or due to mistake as to the nature and purpose of the ceremony or where the marriage was solemnized during intoxication or induced by drugs, renders the marriage void. However, want of ceremonies amounting to mock marriage renders the marriage merely voidable.

Force for our purposes may be defined as power exerted upon an individual in any way, with an intention to overcome his or her will and/or overpower his or her judgment, in order to induce him or her to enter into a marriage to which consent would not otherwise have been given, and actually so overcoming and overpowering. The force which may negative may consist of threats of death or grievous physical harm, or threats of imprisonment or arrest. It may also consist of threat of a less serious harm, but involving mental suffering. The test applied in cases of force must be the reaction of the particular individual concerned.

Fraud for the purposes of nullity of marriage may be defined as a deliberate act of deception and/or dishonesty including a concealment or misrepresentation of an existing material fact or facts in any way relating to the essence of the marriage, and actually inducing that marriage. The test to be applied in such a case is, "Did the concealment

or the misrepresentation go to the root of the marriage. Thus, we find that fraudulent concealment and/or misrepresentation in the following regards, relied upon by the petitioner and actually inducing him to consent to the marriage, may usually be held to be fraud going to the "essence" of the marriage and hence will be sufficient ground for annulling a marriage: concealment of:- an intention not to cohabit and not to have children, sterility and physical incapacity, incurable disease affecting health and well-being of the spouses and their children; misrepresentation as to:- premarital pregnancy, caste and religion. A decree of nullity, however, will usually be denied for misrepresentations as to premarital unchastity, premarital status, as to personal qualities, including character, rank, family reputation, fortune, temper, habits and property.

(7) A marriage under HMA and the Kenya Ordinance (in Uganda, however, it may come under "fraud") may be annulled on the ground of concealed-pregnancy at the time of marriage. The petitioner has to satisfy the Court, in order to obtain the relief that he was ignorant of the facts alleged, that the proceedings have been instituted within the prescribed time limit, and that marital intercourse with his consent has not taken place since the discovery, by him, of the existence of the grounds for a decree.

The term "ignorant" means, applying an objective test, that in the circumstances of the case the petitioner, as a reasonable man, was not aware at the time of the marriage of the fact that the respondent was pregnant.

The petitioner is barred from petitioning for nullity, where the petition was presented after the expiration of time prescribed for its presentation. This time is absolute and can not be extended. However, it is submitted that this clause should be amended, in order that the period may be extended to cover the period where the petitioner's right to nullity has been concealed by the fraud of the respondent. It is submitted that this clause should be amended to read "with the discretion of the Court...".

The term "discovered" means, after applying an objective test, that whether the facts before the petitioner would have made clear to a reasonable man that the respondent was pregnant as alleged. However, the words "intercourse with the consent of the petitioner" are meaningless and superfluous.

The standard of proof to be followed in a nullity suit on the ground of concealed-pregnancy is civil standard of proof, i.e., balance of probabilities. The test to be applied in such a case is: whether on the facts and circumstances established by the petitioner a prudent man, i.e.,

the judge, would be completely satisfied as to the facts alleged.

(8) A marriage on the ground of venereal disease in a communicable form is voidable under the Kenya Ordinance. However, under HMA and Uganda Ordinance it may be annulled on the ground of fraud to the extent to which non-disclosure of advanced staged of venereal disease may amount to fraud. The expression "... in a communicable form" means communicable to any person. The preliminary requirements, the standard of proof and the test to be applied in such a case are the same as to be applied in a case of concealed-pregnancy.

APPENDIX I

THE HINDU MARRIAGE ACT

Act 25 of 1955

[18 May 1955]

An Act to amend and codify the law relating to marriage
among Hindus

BE it enacted by Parliament in the Sixth Year of the
Republic of India as follows:

PRELIMINARY

1. Short title and extent

(1) This Act may be called the Hindu Marriage Act,
1955.

(2) It extends to the whole of India except the State of
Jammu and Kashmir, and applies also to Hindus domi-
ciled in the territories to which this Act extends who
are outside the said territories.

2. Application of Act

(1) This Act applies--

(a) to any person who is a Hindu by religion in any
of its forms or developments, including a Virashaiva,
a Lingayat or a follower of the Brahmo, Prarthana
or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh
by religion, and

(c) to any other person domiciled in the territories
to which this Act extends who is not a Mulsim,
Christian, Parsi or Jew by religion, unless it is
proved that any such person would not have been
governed by the Hindu law or by any custom or usage
as part of that law in respect of any of the matters
dealt with herein if this Act had not been passed.

Explanation. The following persons are Hindus,
Buddhists, Jainas or Sikhs by religion, as the case
may be:

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Schedules Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions

In this Act, unless the context otherwise requires, -

(a) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further than in the case of a rule applicable only to a family it has not been discontinued by the family;

(b) 'district court' means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(c) 'full blood' and 'half blood' -- two persons are said to be related to each other by full blood when they are descended from a common ancestor by the

same wife and by half blood when they are descended from a common ancestor but by different wives;

(d) 'uterine blood' -- two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation. In clauses (c) and (d), 'ancestor' includes the father and 'ancestress' the mother;

(e) 'prescribed' means prescribed by rules made under this Act:

(f) (i) 'sapinda relationship' with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be 'sapindas' of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;

(g) 'degrees of prohibited relationship' -- two persons are said to be within the 'degress of prohibited relationship' --

(i) if one is a lineal ascendant of the other; or

(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation. For the purposes of clauses (f) and (g), relationship includes--

(i) relationship by half or uterine blood as well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood; and all terms of relationship in those clauses shall be construed accordingly.

4. Overriding effect of Act

Save as otherwise expressly provided in this Act,--

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

HINDU MARRIAGES

5. Conditions for a Hindu marriage

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) neither party is an idiot or a lunatic at the time of the marriage;

(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

6. Guardianship in marriage

(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:

(a) the father;

(b) the mother;

- (c) the paternal grandfather;
 - (d) the paternal grandmother;
 - (e) the brother by full blood; as between brothers the elder being preferred;
 - (f) the brother by half blood; as between brothers by half blood the elder being preferred;
 - Provided that the bride is living with him and is being brought up by him;
 - (g) the paternal uncle by full blood; as between paternal uncles the elder being preferred;
 - (h) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;
 - Provided that the bride is living with him and is being brought up by him;
 - (i) the maternal grandfather;
 - (j) the maternal grandmother;
 - (k) the maternal uncle by full blood; as between maternal uncles the elder being preferred;
 - Provided that the bride is living with him and is being brought up by him.
- (2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.
- (3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.
- (4) In the absence of any such person as is referred to in subsection (1), the consent of a guardian shall not be necessary for a marriage under this Act.
- (5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. Ceremonies for a Hindu marriage

- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
- (2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. Registration of Hindu marriages

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in subsection (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in subsection (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

9. Restitution of conjugal rights

(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground

for judicial separation or for nullity of marriage or for divorce.

10. Judicial separation

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party --

- (a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or
- (c) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy; or
- (d) has, for a period¹ of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or
- (e) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; or
- (f) has, after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse.

Explanation. -- In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE AND DIVORCE

II. Void marriages

Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

12. Voidable marriages

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in subsection (1), no petition for annulling a marriage --

(a) on the ground specified in clause (c) of subsection

(1) shall be entertained if --

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of subsection

(1) shall be entertained unless the court is satisfied--

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

- (ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. Divorce

- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party --
- (i) is living in adultery; or
 - (ii) has ceased to be a Hindu by conversion to another religion; or
 - (iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or
 - (iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or
 - (v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or
 - (vi) has renounced the world by entering any religious order; or
 - (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or
 - (viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.¹

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, --

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

14. No petition for divorce to be presented within three years of marriage

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

1. For the effect of the insertion here of clause (1a) for Uttar Pradesh by Uttar Pradesh Act 13 of 1962 see § 384 above.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. Divorced persons when may marry again

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. Legitimacy of children of void and voidable marriages

Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. Punishment of bigamy

Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of

such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code¹ shall apply accordingly.

18. Punishment for contravention of certain other conditions for a Hindu marriage

Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v) and (vi) of section 5 shall be punishable --

(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(c) in the case of a contravention of the condition specified in clause (vi) of section 5, with fine which may extend to one thousand rupees.

JURISDICTION AND PROCEDURE

19. Court to which petition should be made

Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. Contents and verification of petition

(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law

1. 45 of 1860.

for the verification of complaints, and may, at the hearing, be referred to as evidence.

21. Application of Act V of 1908

Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

22. Proceedings may be in camera and may not be printed or published

(1) A proceeding under this Act shall be conducted in camera if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in subsection (1), he shall be punishable with fine which may extend to one thousand rupees.

23. Decree in proceedings

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that --

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of subsection (1) of section 10, or in clause (i) of subsection (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

24. Maintenance pendente lite and expenses of proceedings

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. Permanent alimony and maintenance

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. Custody of children

In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. Disposal of property

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. Enforcement of, and appeal from, decrees and orders

All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of the original civil jurisdiction are enforced and may be appealed from under any law for the time being in force.

Provided that there shall be no appeal on the subject of costs only.

SAVINGS AND REPEALS

29. Savings

(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954¹ with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

[s.30, the repealing section, was itself repealed by Act 58 of 1960.]

APPENDIX II

CHAPTER 157

28 of 1960

THE [KENYA] HINDU MARRIAGE AND DIVORCE

ORDINANCE

Commencement: 19th July 1960

An Ordinance to regulate the marriage of, and provide for matrimonial causes between, Hindus and persons of allied religions.

PART I - PRELIMINARY

1. This Ordinance may be cited as the Hindu Marriage and Divorce Ordinance. Short title.

2. (1) In this Ordinance, except where the context otherwise requires -- Interpretation.

"court" means the Supreme Court;

"custom" means a rule which, having been continuously observed for a long time, has attained the force of law among a community, group or family, being a rule that is certain and not unreasonable or opposed to public policy; and, in the case of a rule applicable only to a family, has not been discontinued by the family;

"Hindu" means a person who is a Hindu by religion in any form (including a Virashaiva, a Lingayat and a follower of the Brahmo. Prarthana or Arya Samaj) or a person who is a Buddhist of Indian origin, a Jain or a Sikh by religion.

"marriage" means a marriage between Hindus and either --

(a) solemnized after the commencement of this Ordinance, or

(b) a marriage which, immediately before the commencement of this Ordinance, was deemed, under section 3 (now repealed) of the Hindu Marriage, Divorce and Succession Ordinance, to be a valid marriage or which would have been so deemed if it had been solemnized in Kenya, or Cap.149(1948)

(c) a marriage solemnized under the Special Marriage Act, 1954, or the Hindu Marriage Act, 1955, of India, as amended from time to time, and any enactment substituted therefor; 43 of 1954
25 of 1955

"of the full blood" means descended from a common ancestor by the same wife;

"of the half blood" means descended from a common ancestor but by different wives;

"of uterine blood" means descended from a common ancestress but by different husbands.

(2) For the purposes of this Ordinance, the following persons are Hindus, Buddhists, Jains or Sikhs, as the case may be--

(a) a person, legitimate or illegitimate, both of whose parents are or were Hindus, Buddhists, Jains or Sikhs by religion;

(b) a person, legitimate or illegitimate, one of whose parents is or was a Hindu, a Buddhist, a Jain or a Sikh by religion and who has been brought up as a member of the community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or reconvert to the Hindu, the Buddhist, Jain or Sikh religion.

PART II -- HINDU MARRIAGES

Conditions for Hindu marriages. 3. (1) A marriage may be solemnized if the following conditions are fulfilled--

(a) neither party has a spouse living at the time of the marriage;

(b) both parties are of sound mind at the time of the marriage;

- (c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of the marriage;
- (d) where the bride has not attained the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage;
- (e) the parties are not within the prohibited degrees of consanguinity, unless the custom governing each of them permits of a marriage between them.

(2) For the purposes of this section, two persons are within the prohibited degrees of consanguinity if --

- (a) one is a lineal ancestor of the other;
- (b) one was the wife or husband of a lineal ancestor or descendant of the other;
- (c) one was the wife of the father's or mother's brother or of the grandfather's or grandmother's brother of the other;
- (d) one was the husband of the father's or mother's sister or of the grandfather's or grandmother's sister of the other;
- (e) they are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of brothers or sisters; or
- (f) they have a common ancestor not more than two generations distant, if ancestry is traced through the mother of the descendant, or four generations distant, if ancestry is traced through the father of the descendant.

(3) The relationships referred to in subsection (2) of this section include those of the half blood and of uterine blood as well as those of the full blood, and the illegitimate child and adopted

child of any person shall be deemed to be respectively the legitimate child and the child of the marriage of such person.

4. (1) Wherever the consent of a guardian in marriage is necessary for a bride under this Ordinance, the guardian in marriage shall be-- Guardian-ship in marriage.

- (a) the father; whom failing
- (b) the mother; whom failing
- (c) the paternal grandfather; whom failing
- (d) the paternal grandmother; whom failing
- (e) the brother of the full blood, as between brothers the elder being preferred; whom failing
- (f) the brother of the half blood, as between brothers of the half blood the elder being preferred, if the bride is living with him and is being brought up by him; whom failing
- (g) the paternal uncle of the full blood, as between paternal uncles the elder being preferred; whom failing
- (h) the paternal uncle of the half blood, as between paternal uncles of the half blood the elder being preferred, if the bride is living with him and is being brought up by him; whom failing
- (i) the maternal grandfather; whom failing
- (j) the maternal grandmother; whom failing
- (k) the maternal uncle of the full blood, as between maternal uncles the elder being preferred, if the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as guardian in marriage under the provisions of this section unless such person has himself attained the age of twenty-one years.

(3) Where the person entitled to be the guardian in marriage refuses, or is for any cause unable or unfit, to act, the person next in order shall be entitled to be the guardian.

(4) If there is no such person as is referred to in sub-section (1) of this section, the consent of a guardian in marriage shall not be necessary.

Ceremonies 5. (1) A marriage may be solemnized for Hindu with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step has been taken.

(3) Where the marriage is solemnized in the form of Anand Karaj (that is, the going round the Granth Sahib by the bride and bridegroom together), the marriage becomes complete and binding as soon as the fourth round has been completed.

Registra- 6. (1) The Minister may make rules tion of requiring and prescribing the manner Hindu of registration of all or any marriages marriages. solemnized in Kenya.

(2) Separate or different rules may be made with respect to the marriages of Hindus belonging to different castes or communities.

(3) Without prejudice to the generality of the foregoing provisions, any such rules may ---

- (a) require marriages to be compulsorily registered;
- (b) require the priest or other person performing the marriage ceremony to issue a certificate of marriage in the prescribed form;

- (c) require any marriage to be registered within the period prescribed by the rules;
- (d) impose fees for the issue of certificates of marriage and for the issue of copies or translations of certificates of marriage;
- (e) impose penalties of imprisonment for a term not exceeding six months or a fine of not more than six thousand shillings, or both, for the breach thereof;
- (f) provide for the receiving in evidence of entries in the register and marriage certificates, and of certified copies thereof.

(4) Notwithstanding anything contained in this section, the validity of a marriage shall in no way be affected by the omission to make an entry in any marriage register, nor shall registration render valid any marriage which would otherwise be invalid.

7. (1) A marriage, whether solemnized before or after the commencement of this Ordinance, shall not be capable of being dissolved during the joint lives of the parties otherwise than in accordance with the provisions of this Ordinance. Provisions as to Hindu marriages.

(2) A marriage solemnized under this Ordinance shall be a marriage within the meaning of the Matrimonial Causes Ordinance. Cap.152

(3) A marriage solemnized after the commencement of this Ordinance shall be void if the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force; and the provisions of section 171 of the Penal Code shall apply in such a case. Cap.63.

(4) Notwithstanding the provisions of section 15 of the Subordinate Courts (Separation and Maintenance) Ordinance, the provisions of that Ordinance shall apply in respect of any husband and wife whose marriage at the commencement of Cap.153.

this Ordinance is deemed under section 3 (now repealed) of the Hindu Marriage, Divorce and Succession Ordinance to be a valid marriage or would be so deemed if it had been solemnized in Kenya. Cap.149 (1948)

(5) Notwithstanding the provisions of section 15 of the Subordinate Courts (Separation and Maintenance) Ordinance, the provisions of that Ordinance shall apply to the husband and wife of every marriage.

- Offences. 8. Whoever solemnizes or procures to be solemnized a marriage in respect of which any of the conditions specified in paragraphs (c), (d) and (e) of subsection (1) of section 3 of this Ordinance has not at the time of the marriage been fulfilled shall be liable--
- (a) in the case of the condition specified in the said paragraph (c), to imprisonment for a term not exceeding fourteen days or to a fine not exceeding five hundred shillings, or to both such imprisonment and such fine;
 - (b) in the case of the condition specified in the said paragraph (d), to a fine not exceeding one thousand shillings; and
 - (c) in the case of the condition specified in the said paragraph (e), to imprisonment for a term not exceeding one month or to a fine not exceeding one thousand shillings, or to both such imprisonment and such fine.

PART III - MATRIMONIAL CAUSES

- Matrimonial causes.
Cap.152.
9. Except where and to what extent that other provision is made in this Ordinance, the provisions of the Matrimonial Causes Ordinance shall apply to matrimonial causes relating to marriages, and the Matrimonial Causes Ordinance shall, in relation to marriages, be subject to the provisions of this Part.
- Grounds for divorce.
10. (1) A petition for divorce may be presented to the court by either party to a marriage whether solemnized before or after the commencement of this Ordinance on the ground that --
- (a) the respondent has since the celebration of the marriage committed adultery; or
 - (b) the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
 - (c) the respondent has since the celebration of the marriage treated the petitioner with cruelty; or
 - (d) the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; or
 - (e) the respondent has ceased to be a Hindu by reason of conversion to another religion; or
 - (f) the respondent has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; or

- (g) a decree of judicial separation has been in force between the parties for a period of at least two years immediately preceding the presentation of the petition, and the parties have not cohabited since the date of the decree;

and by the wife on the ground that her husband--

- (f) has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality; or

- (g) in the case of a marriage solemnized before the commencement of this Ordinance--

- (i) at the time of the marriage was already married; or

- (ii) married again before such commencement,

the other wife being in either case alive at the date of presentation of the petition.

(2) For the purposes of this section, a person of unsound mind shall be deemed to be under care and treatment while he is detained, whether in Kenya or elsewhere, in an institution duly recognized by the Government as an institution for the care and treatment of insane persons, lunatics or mental defectives, or is detained as a criminal lunatic under any law for the time being in force; and a certificate under the hand of the Minister that any place is a duly recognized institution for the purpose of this section shall be receivable in all courts as conclusive evidence of that fact.

II. (1) The following are the grounds on which a decree of nullity of marriage may be made--

Grounds
for
decree of
nullity.

- (a) in the case of a marriage solemnized after the commencement of this Ordinance --

- (i) that either party had a spouse living at the time of the marriage, and the marriage with such spouse was then in force; or
 - (ii) that the parties are within the prohibited degrees of consanguinity, unless the custom governing each of them permits of a marriage between them;
- (b) in the case of any marriage, whether solemnized before or after the commencement of this Ordinance--
- (i) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or
 - (ii) that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy; or
 - (iii) that the consent of either party to the marriage or of the guardian in marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or
 - (iv) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
 - (v) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

Provided that, in the cases specified in subparagraphs (ii), (iv) and (v) of paragraph (b) of this subsection, the court shall not grant a decree unless it is satisfied--

- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
- (ii) that proceedings were instituted, in the case of a marriage solemnized before the commencement of this Ordinance, within one year after such commencement, and, in the case of any other marriage, within one year after the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree.

(2) (a) Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

(b) Paragraph (a) of this subsection shall not operate so as to confer on a child any rights in the property of any person other than its parents in any case where, but for this section, such child would have been incapable of acquiring or possessing such rights by reason of its illegitimacy.

(3) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

12. A petition for judicial separation may be presented to the court by either the husband or the wife on any of the following grounds--

Grounds for
judicial
separation.

- (a) on any of the grounds on which a petition for divorce might be presented by that party; or

- (b) that the respondent has deserted the petitioner without cause for a period of at least two years immediately preceding the presentation of the petition; or
- (c) that the respondent has since the celebration of the marriage treated the petitioner with cruelty; or
- (d) that the respondent has failed to comply with a decree for restitution of conjugal rights.

APPENDIX III

EXTRACTS FROM Cap.112: AN ORDINANCE RELATING TO DIVORCE
[1951]

[THE LAWS OF UGANDA/(Law 1) Vol.III]

NULLITY OF MARRIAGE

Petitions 12. A husband or a wife may present a
for nullity petition to the court praying that his
of marriage. or her marriage may be declared null and
 void.

Grounds 13. (1) The following are the grounds
for decree on which a decree of nullity of marriage
of nullity. may be made--

(a) that the respondent was permanently impotent
at the time of the marriage;

(b) that the parties are within the prohibited
degrees of consanguinity (whether natural or
legal) or affinity;

(c) that either party was a lunatic or idiot at
the time of the marriage;

(d) that the former husband or wife or either
party was living at the time of the marriage,
and the marriage with such previous husband or
wife was then in force;

(e) that the consent of either party to the
marriage was obtained by force or fraud, in any
case in which the marriage might be annulled on
this ground by the law of England.

(2) If the court finds that the petitioner's case has
been proved it shall pronounce a decree nisi declaring
the marriage to be null and void.

<p>14. Where a marriage is annulled on the ground that a former husband or wife was living, and it is found that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband</p>	<p>Children of annulled marriage.</p>
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or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the decree nisi is made shall be specified in the decree, and shall be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.

APPENDIX IV

[THE UGANDA] HINDU MARRIAGE AND DIVORCE ORDINANCE, 1961.

No.2 of 1961.

An Ordinance To Regulate The Marriage Of And Provide For Matrimonial Causes Between Hindus And Persons Of Allied Religions.

[BY NOTICE]

Enacted by the Legislature of the Uganda Protectorate.

- | | |
|---|--------------------------------------|
| <p>1. This Ordinance may be cited as the Hindu Marriage and Divorce Ordinance, 1961, and shall come into force on a date to be appointed by the Governor by notice in the Gazette.</p> | <p>Short title and commencement.</p> |
| <p>2. (1) In this Ordinance, unless the context otherwise requires -- "custom" means a rule which, having been continuously observed for a long time, has attained the force of law among a community, group, or family, being a rule that is certain and not unreasonable or opposed to public policy and, in the case of a rule applicable only to a family, has not been discontinued by the family;</p> | <p>Interpretation.</p> |

"Hindu" means a person who is a Hindu by religion in any form (including a Virashaiva, a Lingayat and a follower of the Brahmo, Prarthana or Arya Samaj) or a person who is a Buddhist of Indian origin, a Jain or a Sikh by religion;

"marriage" means a marriage between Hindus which is either --

(a) a marriage solemnized under the provisions of this Ordinance; or

(b) a marriage (including a polygamous marriage) solemnized before the commencement of this Ordinance inside or outside the Protectorate and recognised as such by both parties; or

No.28
of 1960.
No.43
of 1954.
No.25
of 1955.

(c) a marriage solemnized under the provisions of the Hindu Marriage and Divorce Ordinance, 1960, of the Colony and Protectorate of Kenya, the Special Marriage Act, 1954, of India or the Hindu Marriage Act, 1955, of India, or any enactment substituted for that Ordinance or those Acts; or

(d) a marriage declared by the Minister by notice in the Gazette to be a marriage for the purposes of this Ordinance;

"Minister" means the Minister for the time being responsible for the administration of this Ordinance;

"of the full blood" means descended from a common ancestor by the same wife;

"of the half blood" means descended from a common ancestor but by different wives;

"of uterine blood" means descended from a common female ancestor but different husbands.

(2) For the purposes of this Ordinance, the following persons are Hindus, Buddhists, Jains or Sikhs, as the case may be--

(a) a person, legitimate or illegitimate, both of whose parents are or were Hindus, Buddhists, Jains or Sikhs by religion;

(b) a person, legitimate or illegitimate, one of whose parents is or was a Hindu, a Buddhist, a Jain or a Sikh by religion and who has been brought up as a member of the community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or reconvert to the Hindu, the Buddhist, Jain or Sikh religion.

Conditions
for
marriage.

3. (1) A marriage may be solemnized if the following conditions are fulfilled--

(a) neither party has a spouse living at the time of the marriage;

(b) both parties are of sound mind at the time of the marriage;

(c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of the marriage;

(d) where the bride has not attained the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage;

(e) the parties are not within the prohibited degrees of consanguinity, unless the custom governing each of them permits of a marriage between them.

(2) For the purposes of this section two persons are within the prohibited degrees of consanguinity if--

(a) one is a lineal ancestor of the other;

(b) one was the wife or husband of a lineal ancestor or descendant of the other;

(c) one was the wife of the father's or mother's brother or of the grandfather's or grandmother's brother of the other;

(d) one was the husband of the father's or mother's sister or of the grandfather's or grandmother's sister of the other;

(e) they are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of brothers or sisters; or

(f) they have a common ancestor not more than two generations distant (if ancestry is traced through the mother of the descendant) or four generations distant (if ancestry is traced through the father of the descendant).

(3) The relationships referred to in subsection (2) of this section shall include those of the half blood and of uterine blood as well as those of the full blood, and the illegitimate child and adopted child of any person shall be deemed to be respectively the legitimate child and the child of the marriage of such person.

Guardian-
ship in
marriage.

4. (1) Wherever the consent of a guardian in marriage is necessary for a bride under this Ordinance the guardian in marriage shall be--

(a) the father; whom failing

(b) the mother; whom failing

(c) the paternal grandfather; whom failing

(d) the paternal grandmother; whom failing

(e) the brother of the full blood, as between brothers the elder being preferred; whom failing

(f) the paternal uncle of the full blood, as between paternal uncles the elder being preferred; whom failing

(g) the maternal grandfather; whom failing

(h) the maternal grandmother.

(2) No person shall be entitled to act as guardian in marriage under the provisions of this section unless such person has himself attained the age of twenty-one years.

(3) Where the person entitled to be the guardian in marriage refuses, or is for any cause unable or unfit, to act, the person next in order shall be entitled to be the guardian.

(4) If there is no such person as is referred to in subsection (1) of this section, a guardian in marriage may be appointed by a first-class magistrate on the application of any interested party.

Ceremonies
for
marriages.

5. (1) A marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step has been taken.

(3) Where the marriage is solemnized in the form of Anand Karaj (that is, the going round the Granth Sahib by the bride and bridegroom together), the marriage becomes complete and binding as soon as the fourth round has been completed.

Registra-
tion of
marriages.

6. (1) The Minister shall make rules--

(a) requiring marriages to be registered within a period to be prescribed in the rules; and

(b) requiring the priest or other person performing the marriage ceremony to issue a certificate of marriage in a form to be prescribed in the rules; and

(c) imposing fees for the issue of certificates of marriage and for the issue of copies or translations of such certificates; and

(d) providing for the receiving in evidence of entries in the register and marriage certificates and of certified copies thereof; and

(e) providing for anything incidental to or connected with the registration of marriages.

(2) Rules made under the provisions of this section may provide that any person who contravenes or fails to comply with any provision thereof shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings.

(3) All fees collected in pursuance of rules made under the provisions of this section shall be paid into the general revenue of the Protectorate.

(4) Notwithstanding anything contained in this section, the validity of a marriage shall in no way be affected by the omission to make an entry in any marriage register nor shall registration render valid any marriage which would otherwise be invalid.

Bigamy,
etc.

7. (1) A marriage solemnized after the commencement of this Ordinance shall be void if the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force, and the provisions of section 150 of the Penal Code shall apply in such a case.

Cap.22.

(2) A marriage, whether solemnized before or after the commencement of this Ordinance, shall not be capable of being dissolved during the joint lives of the parties otherwise than in accordance with the provisions of this Ordinance.

Offences.

8. Whoever solemnizes or procures to be solemnized a marriage in respect of which any of the conditions specified in paragraphs (c), (d) and (e) of subsection (1) of section 3 of this Ordinance has not at the time of the marriage been fulfilled shall be liable--

(a) in the case of the condition specified in paragraph (c) of that subsection to a fine not exceeding five hundred shillings;

(b) in the case of the conditions specified in paragraph (d) of that subsection to a fine not exceeding one hundred shillings; and

(c) in the case of the condition specified in paragraph (e) of that subsection to a fine not exceeding one thousand shillings.

Matrimonial
causes.
Cap.112.

9. (1) Subject to the provisions of this section, the Divorce Ordinance shall apply to marriages and to matrimonial causes relating to marriages.

(2) In addition to the grounds for divorce mentioned in the Divorce Ordinance, a petition for divorce may be presented--

(a) by either party to a marriage on the ground that--

(i) the respondent has ceased to be a Hindu by reason of conversion to another religion; or

(ii) the respondent has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; and

(b) by the wife, in the case of a marriage solemnized before the commencement of this Ordinance, on the ground that her husband--

(i) at the time of the marriage was already married; or

(ii) married again before the commencement of this Ordinance, the other wife being in either case alive at the date of presentation of the petition.

(3) A decree of nullity of marriage--

(a) shall not be granted on the ground that the parties are within the prohibited degrees of consanguinity if the custom governing each party permits a marriage between them;

(b) in the case of a marriage solemnized before the commencement of this Ordinance shall not be granted on the grounds that the former husband or wife of either party was living at the time of the marriage and the marriage with such previous husband or wife was then in force; and

(c) may be granted on the ground that the consent of a guardian in marriage was necessary under the provisions of this Ordinance and was obtained by force or fraud.

(4) In this section references to the Divorce Ordinance include a reference to any Ordinance replacing that Ordinance.

PASSED in the Legislative Council on the 9th day of February, 1961.

Ph. PULLICINO,

Clerk of Council.

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